No. 99-345

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

COUNTY OF COOK, ILLINOIS, EDWARD J. ROSEWELL, COUNTY TREASURER AND COUNTY COLLECTOR OF THE COUNTY OF COOK, ILLINOIS, DAVID D. ORR, CLERK OF THE COUNTY OF COOK, ILLINOIS, THOMAS C. HYNES, ASSESSOR OF COOK COUNTY, AND THE PEOPLE OF THE STATE OF ILLINOIS, ON RELATION OF EDWARD J. ROSEWELL AND THE COUNTY OF COOK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine of res judicata precludes the United States from asserting that sovereign immunity bars Cook County, Illinois, from assessing interest and penalties in excess of $33 million against the federal government for the late payment of property taxes on two federal buildings located in the County.

2. Whether a statutory consent to the imposition of state and local "taxes" on certain narrowly defined categories of property owned by the United States (42 U.S.C. 602a(d)) also consents to the imposition of penalties and interest accruing on such taxes under local law.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 167 F.3d 381. The opinion of the district court (App., *infra*, 27a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1999. The petition for rehearing was

denied on April 30, 1999 (App., *infra*, 94a). On July 15, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including August 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

40 U.S.C. 602a provides, in relevant part:

> (a) Whenever the Administrator of General Services determines that the best interests of the United States will be served by taking action hereunder, he is authorized to provide space by entering into purchase contracts, the terms of which shall not be more than thirty years and which shall provide in each case that title to the property shall vest in the United States at or before the expiration of the contract term and upon fulfillment of the terms and conditions stipulated in each of such purchase contracts. Such terms and conditions shall include provision for the application to the purchase price agreed upon therein of installment payments made thereunder. * * *
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> * * * * *
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> (d) With respect to any interest in real property acquired under the provisions of this section, the same shall be subject to State and local taxes until title to the same shall pass to the Government of the United States.

STATEMENT

1. In the early 1970's, the United States entered into contracts for the construction of two federal office buildings on land owned by the federal government in

Cook County, Illinois. These buildings—the Harold Washington Social Security Center and the Federal Archives and Records Administration Center—were purchased and financed by the United States under installment contracts entered into pursuant to 40 U.S.C. 602a (App., *infra*, 2a). Under that statute, the private institutions that finance the construction and acquisition of federal buildings hold legal title to the buildings, as trustee for the United States, during the period (not to exceed 30 years) over which the construction costs are paid. *Id.* at 29a.[1] The United States is the equitable owner of the property during this payment period. *Ibid.* See 40 U.S.C. 602a(a). Until the legal title to the property passes from the trustee to the United States, Congress has provided that the interest of the United States in the property "shall be subject to State and local taxes" (40 U.S.C. 602a(d)).

2. a. Respondents are responsible for assessing and collecting real property taxes in Cook County, Illinois. The beneficial owner of real property under an installment contract in Illinois—such as the United States in this case—is "the owner[] of property for purposes of real estate taxation." *Chicago Patrolmen's Ass'n* v. *Department of Revenue*, 664 N.E.2d 52, 57 (Ill. 1996). See also *People* v. *Chicago Title & Trust Co.*, 389

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[1] See, *e.g.*, Malkin Decl., Exh. B, Art. 7 attached to Stipulation of Facts, Exh. 20.. In this case, pursuant to financing agreements, Citibank held legal title to the Social Security Center and the American National Bank and Trust Company of Chicago held legal title to the Records Center. Both buildings have been occupied solely by agencies of the United States and used solely for federal governmental purposes. The United States prepaid the contract balances on the Social Security Center and the Records Center, and acquired legal title to those buildings, in 1993 and 1994 respectively. App., *infra*, 28a-29a.

N.E.2d 540, 543-544 (Ill. 1979). Purporting to act pursuant to the consent to taxation set forth in 40 U.S.C. 602a(d), respondents billed the General Services Administration for assessed property taxes on the Social Security Center and the Records Center upon the completion of those buildings in the mid 1970's. App., *infra*, 75a.[2]

Under Illinois law, the property of the United States was subject to tax only to the extent that "the United States has permitted [it] * * * to be taxed." Ill. Rev. Stat. ch. 120, ¶ 500.4 (1991). Respondents claimed that the federal consent to state and local taxation in 40 U.S.C. 602a(d) satisfied this state-law precondition for application of the state tax. But the state statute further provided an *exemption* from the state tax for "[a]ll property that is being purchased by a governmental body under an installment contract pursuant to statutory authority and used exclusively for the public purposes of the governmental body." *Id.* ¶ 500.9a. Because the Social Security Center and the Records Center fell precisely within the scope of this state-law exemption, the United States refused to pay the taxes assessed on those properties. Under Illinois law, interest accrues on unpaid taxes at the rate of 1.5% per month. *Id.* ¶ 705.

After the United States declined to pay the assessed taxes, respondent Cook County purported to sell the properties to private purchasers at delinquent tax sales. App., *infra*, 76a. The United States responded

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[2] The court of appeals erred in speculating (App., *infra*, 5a) that the taxes were assessed on the lenders rather than on the United States. The County made no "argument along these lines" (*id.* at 6a) because, under state law, the taxes were in fact assessed against the purchaser who had beneficial title, rather than against the lender.

by filing a complaint in federal district court seeking a declaration that the Social Security Center and the Records Center were not subject to taxes, penalties or interest under state law. The complaint also sought to have the purported tax sales set aside. *Ibid.*

b. The district court agreed with the United States that the Social Security Center and the Records Center were exempt from local taxation under state law. The court held the tax assessments and the associated penalties and interest were therefore invalid and set aside the purported tax sales. See App., *infra*, 77a.

The court of appeals affirmed. *United States* v. *County of Cook*, 725 F.2d 1128 (7th Cir. 1984). The court concluded that the federal properties came within the state-law tax exemption for public property being purchased by a governmental body under an installment contract. *Id.* at 1131 (citing Ill. Rev. Stat. ch. 120, ¶ 500.9a (1991)). The court held that 40 U.S.C. 602a(d) does not subject property of the United States to a state tax for which the State itself provides an exemption.

The court of appeals rejected respondents' assertion that the state-law tax exemption should be available only to property owned by state and local governments and not to property of the United States. The court concluded that, by consenting to state "taxes" in 40 U.S.C. 602a(d), Congress did not consent to state taxation that discriminates against the United States. The court concluded that "[t]he consent found in section 602a(e) lacks the specificity we would expect to find if Congress intended to subject the United States to discriminatory taxation." 725 F.2d at 1132.

3. a. Following the Seventh Circuit's decision in *County of Cook*, the Illinois legislature amended

¶ 500.9a to exempt from the real property tax (App., *infra*, 79a (emphasis added))

> [a]ll property that is being purchased by a governmental body under an installment contract pursuant to statutory authority and used exclusively for the public purposes of the governmental body, *except such property as the governmental body has permitted or may permit to be taxed.*

After the Illinois legislature enacted this amendment, respondents again commenced assessing property taxes against the Social Security Center and the Records Center—for 1985, 1986, 1987, and 1988. App., *infra*, 79a-80a.

In 1988, the United States filed a complaint in federal district court contending, under the decision of the Seventh Circuit in *County of Cook*, *supra*, that the amended state taxing scheme unconstitutionally discriminates against the United States. The United States sought declaratory and injunctive relief to preclude respondents from imposing, assessing, or collecting the discriminatory tax. App., *infra*, 80a. The complaint noted that interest accrued on the assessed taxes at the rate of 1.5% per month under state law (Stipulation of Facts, Exh. 10, at 6) but did not otherwise separately address or seek relief from interest or other late-payment charges.

b. Relying on the holding of the Seventh Circuit from the prior appeal in *County of Cook*, *supra*, the district court concluded that the amended version of ¶ 500.9a unconstitutionally discriminates against the United States by denying an exemption from property taxation to the federal government that is available to state and local governmental bodies under the same circumstances. *United States* v. *Hynes*, 759 F. Supp.

1303, 1308 (N.D. Ill. 1991). Although the district court thus held that the discriminatory state tax could not lawfully be applied to the United States, the court concluded that the United States had waived its objection for three of the four tax years at issue (1986, 1987, and 1988) by not following state-law procedures for claiming a tax exemption during those years. App., *infra*, 82a.

c. Both parties appealed. In an en banc decision, with four judges dissenting, the Seventh Circuit held that the local property tax assessed under the amended version of ¶ 500.9a did not unconstitutionally discriminate against the United States and could lawfully be assessed and collected for 1985 and subsequent years. *United States* v. *Hynes*, 20 F.3d 1437, 1443 (1994). In reaching that conclusion, the en banc majority "overrule[d the prior decision of that court in *County of Cook*, *supra*,] to the extent the panel reasoned that taxing federal § 602a property while exempting similar property of state and local governmental bodies would be unconstitutionally discriminatory and that § 602a(d) is not a sufficient consent to such discriminatory taxation." 20 F.3d at 1441.

4. a. Two months after the en banc decision in the *Hynes* case, respondents commenced proceedings in state court to obtain tax deeds to the Social Security Center and the Records Center. Respondents took the position that the United States could "redeem" those properties only by paying the outstanding taxes along with accrued penalties and interest. Under state law, interest accrues at the rate of 1.5% per month until the properties are sold at a tax sale. See page 4, *supra*. Following a tax sale, the property may be redeemed by the taxpayer upon payment of the tax sale price plus "penalty interest," which accrues at the rate of 2% per

month for the first 48 months following the sale. Illinois Revenue Act, 35 Ill. Comp. Stat. Ann. § 205/235a (West 1992); Stipulation of Facts, Exh. 34.

In response to the County's enforcement actions, the United States commenced the present action in federal district court. The complaint seeks declaratory and injunctive relief (i) from tax foreclosure sales of the federal buildings and (ii) from imposition of penalties and interest on the state taxes. The United States contends that, although the en banc decision in *Hynes* holds that the federal government has consented to state and local "taxes" imposed on the Social Security Center and the Records Center, the United States has *not* consented either to tax sales of the properties or to the imposition of penalties or interest on those taxes. In 1995, the United States paid the entire principal amount of the tax assessments on these properties for 1985-1994 (approximately $32 million). The United States has refused, however, to pay the penalties and interest that respondents contend have accrued on those taxes under state law (approximately $33 million as of 1995). App., *infra*, 91a.

Respondents filed a counterclaim in this action seeking a money judgment for any unpaid taxes for tax years 1985-1994, along with interest and penalties under Illinois law. Respondents further asserted that they were entitled to a money judgment against the United States for (i) "just compensation" under the Fifth Amendment of the United States Constitution for the federal government's "repudiation" of its undertaking to pay state taxes, and (ii) unpaid taxes for tax years 1977-1984 (the years addressed in the *County of Cook* case, see pages 5-6, *supra*), along with penalties and interest on those taxes under Illinois law.

b. The district court granted summary judgment to the United States. App., *infra*, 27a-59a. The court first rejected respondent's contention that the claims asserted by the United States in this case are barred by the doctrine of *res judicata*. The court noted that *res judicata* generally precludes a party from "relitigating any issue that was raised in a prior judgment or could have been raised in the prior action." *Id.* at 42a (citing *e.g.*, *Alexander* v. *Chicago Park Dist.*, 773 F.2d 850, 853 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986)). The court held that the doctrine of *res judicata* does not apply to the portions of this action that seek to enjoin the tax sales and to bar the assessment of post-tax sale "penalty interest" (see pages 7-8, *supra*). The court explained that those issues could arise only when a tax sale occurs and therefore could not have been asserted in *Hynes*, which was commenced *before* any tax sale was conducted. App., *infra*, 45a-48a.

The court noted, by contrast, that the interest imposed under state law *before* a tax sale occurs (see page 7, *supra*) *had* been accruing at the time the *Hynes* complaint was filed. The court stated that the government's challenge to that type of interest would therefore be barred under the *res judicata* doctrine except for the fact that a well-established exception to that doctrine applies to this case (App., *infra*, 48a):

> [R]es judicata may be trumped by the doctrine of sovereign immunity. *See Durfee v. Duke*, 375 U.S. 106, 114 (1963). The seminal case for this proposition is *United States v. United States Fidelity & Guaranty* [, 309 U.S. 506, 513-515 (1940),] where the court refused to find that the government's failure in the prior cause of action to raise sovereign immunity or to appeal the final judgment led to either

> waiver of sovereign immunity or res judicata. * * * This conclusion flows from two interrelated proposition[s]: that an officer of the government cannot, by action or inaction, waive sovereign immunity and that a judgment in the absence of waiver of sovereign immunity is void. *Id.*

Having concluded that *res judicata* does not bar the current action, the district court addressed the merits of the government's claims. The court agreed with the government that, by allowing state or local "taxes" to be imposed on certain property of the United States, 40 U.S.C. 602a(d) does not waive the sovereign immunity of the United States from state or local penalties and interest imposed on such taxes and also does not waive the immunity of the United States from tax foreclosure sales of such property. App., *infra*, 50a-57a. The court explained that the statutory consent to the imposition of state and local "taxes" is not "a specific waiver of sovereign immunity from penalties or interest" and thus does not constitute an "express congressional consent" as required by this Court's decision in *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). App., *infra*, 56a-57a.[3]

c. A divided panel of the Seventh Circuit reversed the judgment of the district court. App., *infra*, 1a-26a. The majority opinion concludes that the doctrine of *res*

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[3] In response to a motion filed by respondents, the district court entered an order transferring respondents' claims for "just compensation" to the United States Court of Federal Claims. App., *infra*, 65a. Pursuant to 28 U.S.C. 1292(d)(4)(A), the United States appealed that order to the United States Court of Appeals for the Federal Circuit. On March 11, 1999, the Federal Circuit reversed the transfer order and remanded those counts to the district court. *United States* v. *County of Cook*, 170 F.3d 1084.

judicata precludes the United States from contesting the imposition of interest and penalties for the late payment of property taxes on the Social Security Center and the Records Center. *Id.* at 6a-21a. The court stated that (*id.* at 6a-7a)

> [f]or a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached final judgment. * * * To create a sovereign-immunity exception to these principles would be to abolish them, for every suit involving the interests of the United States potentially involves sovereign immunity.

The court of appeals acknowledged that there is "[s]ome language" in this Court's decision in *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, that "supports th[e] understanding" that *res judicata* does not bar a defense based on the sovereign immunity of the United States that was not asserted and adjudicated in a prior action. App., *infra*, 18a. The "language" to which the court referred was, in fact, the holding of this Court in the *USF&G* case that, when faced with the "collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit * * * [w]e are of the opinion * * * the doctrine of immunity should prevail." 309 U.S. at 514-515. See note 6, *infra*. The panel majority stated that, notwithstanding this unequivocal "language" in *USF&G*, this Court has never "suggest[ed] that its decision had such a sweeping effect." App., *infra*, 19a. The panel majority stated that, far from having any "sweeping effect," "the opinion in *USF&G* vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports."

Ibid. In reaching that conclusion, the panel majority acknowledged, but discounted, the holding of this Court in *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963) (citing the *USF&G* case), that

> the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling.

The panel majority suggested that this statement of the Court in *Durfee* provides no insight for the present case, for it does not say *when* sovereign immunity is "controlling" and when it is not. App., *infra*, 17a.

The panel majority concluded that, to avoid what it regarded as an unduly expansive sovereign immunity exception to *res judicata*, the decision of this Court in *USF&G* should be interpreted to stand only for the proposition that the United States may "ignore proceedings instituted against it in the wrong court." App., *infra*, 20a. Because the proceedings involved in these cases were commenced in the correct court (the federal district court), the majority concluded that the doctrine of *res judicata* bars the government from raising in this case any defense that it "could" have raised in the prior action. *Id.* at 1a, 6a. On the assumption that the defense of sovereign immunity to penalties and interest could have been raised in the prior action in *Hynes* (*id.* at 3a), the panel majority held that the present suit was barred by the doctrine of *res judicata*.[4]

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[4] In making that assumption, the majority failed to address the fact (noted both by the district court and by the dissenting judge in the court of appeals) that the penalties being asserted by respondents in connection with the purported tax sales of the properties could *not* have been asserted or challenged in the prior action—for the events that gave rise to those penalties (the purported tax

The majority found it unnecessary to address the objections brought by the United States in this case to the tax foreclosure sales. The court stated that the United States had "avoided any possibility that the buildings would be sold to satisfy unpaid tax bills" by prepaying the construction loans and taking title directly in 1994. App., *infra*, 2a. In so stating, the court did not address the fact that the purported tax sales challenged by the United States in this case occurred in 1991—a date that was *after* the *Hynes* case was commenced but *before* the United States took title in its own name by paying off the loans. See *id.* at 86a; notes 1, 4, *supra*.

Because the panel concluded that the claims of the United States in this case were barred by the doctrine of *res judicata*, the court did not reach the merits of these claims. The court therefore did not address whether the consent to state and local "taxes" in 40 U.S.C. 602a(d) also constitutes consent to tax foreclosure sales of federal property or to the imposition of state-law penalties and interest against the United States.

d. Judge Rovner dissented from the panel decision. App., *infra*, 21a-26a. She concluded that, under the express holding of this Court in *USF&G*, the doctrine of *res judicata* does "not preclude the Government from raising a sovereign immunity defense to a * * * claim" even though the government could have, but did not, raise that defense in a prior action involving the same claim. *Id.* at 22a-23a. Judge Rovner emphasized that

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sales) had not then occurred. See App., *infra*, 22a n.1 (Rovner, J., dissenting) ("the government challenges the computation of interest and penalties that occurred after *Hynes*, and challenges post-*Hynes* tax sales"), 45a- 48a; page 7, *supra*.

this holding of *USF&G* does not give the government "a second bite at the tax decision" in this case. *Id.* at 26a. Instead, it gives the government "a first bite at penalties, interest, and tax sales" (*ibid.*):

> *USF&G* establishes that the failure of a government official to assert an immunity claim that could have been made does not preclude the Government's later assertion of that claim. The right of immunity supersedes the interest in adjudication of all related issues in a single case.

Reaching the merits of the government's claim, Judge Rovner concluded that the consent of Congress to the imposition of state and local "taxes" on specific types of federal property under 40 U.S.C. 602a(d) does not consent to tax foreclosure sales of such property or to the imposition of state-law interest and penalties on the United States. App., *infra*, 26a. She "agree[d] with the district court's conclusions on the merits" and would have affirmed the judgment of that court. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that "the opinion in *USF&G* vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports" (App., *infra*, 19a). The decision of the panel majority rests upon a flawed understanding of the judge-made doctrine of *res judicata*. It also improperly seeks to usurp the "prerogative" of this Court to determine the continuing validity of its prior decisions (*Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).[5] In view of the sub-

[5] In *Rodriguez de Quijas*, 490 U.S. at 484, the Court admonished that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line

stantial importance of the issues presented, and the emphatic conflict between the decision of the court of appeals and the decision of this Court in *USF&G*, review by this Court is warranted.

1. The doctrine of *res judicata* is an accumulation of judge-made rules that are designed to promote the efficient and fair resolution of disputes. As judge-made doctrine, the rules of *res judicata* have always been understood to be subject to exceptions based upon valid competing interests. The most directly relevant example of this judicial shaping of *res judicata* principles is the decision of this Court in *USF&G*. In that case, this Court unanimously held that, when there is "a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit * * * the doctrine of immunity should prevail." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514-515 (1940).[6] This Court repeated that

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of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Accord, *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

[6] In *USF&G*, the United States filed a claim on behalf of two Indian tribes in a federal bankruptcy proceeding involving a bankrupt coal company. The claim sought payment of royalties due under two leases. The coal company filed a counterclaim, asserting credits due it on the leases from the tribes. The United States did not raise sovereign immunity as a defense against the counterclaim. The district court allowed the claim of the tribes in the amount of $2000, allowed the cross-claim in the amount of $11,060, and entered a judgment in favor of the coal company in the amount of $9060. No party appealed from that judgment. 309 U.S. at 510

The United States subsequently filed suit on behalf of itself and the Indian tribes against the surety who had guaranteed payment of the royalties. This Court rejected the assertion that *res judi-*

conclusion in *Durfee* v. *Duke*, 375 U.S. 106 (1963), noting that "the general rule of finality of jurisdictional determinations is not without exceptions" and that principles of "sovereign immunity may in some contexts be controlling." *Id.* at 114 (citing *USF&G* with approval). See also *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 500 (1941) (citing *USF&G* with approval). Applying this Court's decision in *USF&G*, courts of appeals have long recognized that *res judicata* "is inapplicable where the issue is the waiver of [sovereign] immunity." *Corbett* v. *MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88 n.3 (2d Cir. 1997).[7]

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cata precluded the United States from raising sovereign immunity for the first time as a defense in the second proceeding, because a judgment against the sovereign is "void" in the absence of "affirmative statutory authority" (309 U.S. at 514):

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power.

The Court resolved the "collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit" in favor of the doctrine of immunity. 309 U.S. at 514-515.

[7] This Court also cited *USF&G* with approval in *Great Northern Life Insurance Co.* v. *Reed*, 322 U.S. 47, 53-54 (1944), in stating that:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

The conclusion of *USF&G* that "the doctrine of immunity should prevail" in any "collision" with the doctrine of *res judicata* (309 U.S. at 514-515) does not mean that the government may twice litigate the same defense to the same claim against the same parties. See, *e.g.*, *Sterling* v. *United States*, 85 F.3d 1225, 1231 n.7 (7th Cir. 1996) (Flaum, J., concurring). See also *Durfee* v. *Duke*, 375 U.S. at 114 n.12. It is when the immunity defense was *not* asserted in the first case that it may be raised in a second action involving the same claim. See *USF&G*, 309 U.S. at 515. This holding of *USF&G* results from the fact that "[o]fficers of the United States possess no power through their actions to waive an immunity of the United States." *United States* v. *Murdock Mach. & Eng'g Co.*, 81 F.3d 922, 931 (10th Cir. 1996), quoting *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947).[8] As Judge Waterman explained in describing *USF&G* in *United States* v. *Eastport Steamship Corp.*, 255 F.2d 795, 803 (2d Cir. 1958), while *res judicata* ordinarily prohibits a party from raising a defense that *could* have been raised in prior litigation involving the same claim, the "cases which have departed from this rule * * * establish that the policy underlying *res judicata* must at times yield to policies of greater importance." See also *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 353 (4th Cir. 1998).

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[8] Similarly, in *CFTC* v. *Frankwell Bullion Ltd.*, 99 F.3d 299, 306 n.5 (9th Cir. 1996), the court cited *USF&G* for the conclusion that a federal agency cannot "waive[] its sovereign immunity argument by not raising it before the district court." The court explained that "an official cannot waive sovereign immunity" on behalf of the United States. *Ibid.* See also *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940).

In view of this substantial body of precedent, the court of appeals manifestly erred in stating that the decision of this Court in *USF&G* disappeared "from the law of judgments as soon as the ink dried on volume 309 of the United States Reports" (App., *infra*, 19a). In fact, that decision has routinely been cited by courts and commentators for the established proposition that "the policies supporting the claim preclusion doctrine must often be weighed against the substantial policy concerns" that lie behind the doctrine of "sovereign immunity." 18 James Wm. Moore, *Moore's Federal Practice* § 131.21[3][b], at 131-146 (3d ed. 1999).[9] As the Fifth Circuit stated in *Republic Supply Co.* v. *Shoaf*, 815 F.2d 1046, 1054 n.9 (1987):

> The Supreme Court has recognized that certain interests are sufficiently important to prevail over the application of the doctrine of res judicata. *See, e.g.*, *United States v. USF&G Co.*, 309 U.S. 506, 514-515 * * * (1940) (doctrine of immunity); *Kalb* v. *Feuerstein*, 308 U.S. 433, 443-444 * * * (1940) (congressional action limiting jurisdiction).

The Restatement (Second) of Judgments § 26, comment f, at 240 (1982), similarly indicates that, notwithstanding general principles of *res judicata*, there are occasions when that judge-made doctrine must be relaxed, either because of specific statutory requirements or

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[9] Although Professors Wright, Miller and Cooper apparently would endorse the conclusion of *USF&G* only when enforcement of a judgment "would pose an honest threat to government functions," they forthrightly acknowledge that the basis of the Court's decision in that case was the determination "that sovereign immunity represents such a compelling policy that it should justify disregard of res judicata." 18 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4429, at 289-290 (1981).

because of "strong substantive policies that favor such allowance."[10]

The conclusion of this Court in *USF&G* that "the doctrine of immunity should prevail" in "a collision" with "the desirable principle that rights may be adequately vindicated through a single trial" (309 U.S. at 514-515) thus represents a concrete example of—not a repudiation of—the judge-made principles that govern the doctrine of *res judicata*. In balancing the interests at stake, the Court expressly concluded in *USF&G* that "the sovereign right of immunity from suit" must take precedence. *Ibid*. The contrary decision of the panel majority in the present case simply disagrees with, and thereby flatly contradicts, that holding.[11] Review of the decision below by this Court is therefore warranted.

2. a. The panel majority acknowledged that "[s]ome language" (App., *infra*, 18a) in *USF&G* supports the understanding that the sovereign immunity of the United States cannot be waived by the failure of the government's attorneys to raise that defense in a prior

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[10] See also *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand").

[11] The decision in this case also conflicts with the decision of the court of appeals in *Moody* v. *Wickard*, 136 F.2d 801 (D.C. Cir. 1943). That case involved a suit to enforce a prior money judgment that had been entered against the United States. The court held that the government could assert sovereign immunity as a defense in that enforcement suit "notwithstanding the failure of the United States to take an appeal" from the initial judgment or to raise the issue of sovereign immunity in the first case. Citing the decision of this Court in *USF&G*, the court held in *Moody* that this conclusion "follows from the well established principle that jurisdiction to sue the United States or to enforce the withdrawal of money from the Treasury must rest upon an Act of the Congress." *Id*. at 803.

judicial proceeding. The majority concluded, however, that the holding in *USF&G* ultimately turned on the fact that the district court that entered the judgment against the United States in the first proceeding in that case lacked subject-matter jurisdiction to do so. Building on that premise, the majority held that *USF&G* was distinguishable because, in this case, the federal district court in which the prior action was litigated did have jurisdiction to do so. *Id.* at 16a.

That interpretation of *USF&G* is manifestly flawed. As the dissent of Judge Rovner correctly observes, the plain text of *USF&G* rests its holding on principles of sovereign immunity, not subject matter jurisdiction. See App., *infra*, 23a & n.2; 309 U.S. at 513-515; note 6, *supra*. Other courts of appeals and expert commentators have uniformly agreed that "[t]he decision [in *USF&G*] rested solely on the ground of sovereign immunity and the doctrine that sovereign immunity cannot be waived." 18 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4429, at 289 (1988). See also *Moore's Federal Practice*, *supra*, at 131-146; notes 9, 11, *supra*.[12]

In *USF&G*, this Court held that a judgment entered on a claim that was *actually* litigated did not preclude the United States from invoking sovereign immunity to defend against enforcement of the judgment in a second suit. See notes 6, 11, *supra*. In the present case, by contrast, the court of appeals held that a judgment that did *not* address, consider, or resolve the question of

[12] The panel majority's statement that *USF&G* does not protect the United States from the risk of losing a case it brought on its own behalf in the proper court (App., *infra*, 20a), cannot be reconciled with the fact that in *USF&G*, as in the present case, the United States initiated the action that culminated in the judgement entered against it. See note 6, *supra*.

interest and penalties (see page 6, *supra*) bars the United States from invoking sovereign immunity to defend against enforcement of such claims. As the dissent correctly recognized (App., *infra*, 24a) (footnote omitted):

> [T]his case is even stronger than *USF&G*, because there the royalties claim was actually decided by the Court while the government stood mute regarding its immunity rights. In this case, no court has addressed the claims regarding interest, penalties, and tax sales, and the interest in finality of judgments is presumably weaker.

b. The panel majority erroneously asserts that the interpretation of *USF&G* advanced by the United States in this case would have the "dire effect" of making "res judicata all but disappear for claims against the United States and make many judgments advisory in the process." App., *infra*, 19a. The instances in which the principles involved in this case are applied are inherently few, for the United States routinely seeks to raise all appropriate issues—including immunity issues—in litigation that it commences or defends. There is no evidence that the United States has abused the sovereign immunity exception to *res judicata* recognized in *USF&G* in the sixty years since that case was decided. Certainly the present case reflects no such abuse: indeed, the issue of penalties and interest would not now be pending if, in the *Hynes* case, the Seventh Circuit had not overruled its own prior decision in *County of Cook*. See page 7, *supra*. It is ironic that, in a case involving the conclusive effect of prior adjudications under the doctrine of *res judicata*, the Seventh Circuit would fault the United States for (i) failing to anticipate in *Hynes* that the court would

overrule its own decision in *County of Cook* and (ii) failing to assert additional defenses at the pleadings stage in *Hynes* based upon that assumption. It is plainly not an abuse for the United States to fail to anticipate that the court of appeals would not regard its own prior judgment as conclusive.

c. The panel majority further erred in concluding (App., *infra*, 12a) that *Montana* v. *United States*, 440 U.S. 147 (1979), supports its holding in this case. In *Montana*, this Court concluded that the United States was collaterally estopped from challenging the constitutionality of a state gross receipts tax imposed on federal contractors by the adverse decision in a prior state court case which, though brought by a contractor, had been controlled by the United States. 440 U.S. at 155. The conclusion in *Montana* that the United States may not *twice* litigate the *same* issue is obviously not inconsistent with *USF&G*, which holds that the United States has the right to be heard on a sovereign immunity defense that was *not* raised in prior litigation.[13]

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[13] For the same reason, the panel erred in seeking to rely (App., *infra*, 11a) on the decision entered 34 years *before USF&G* in *Gunter* v. *Atlantic Coast Line Railroad*, 200 U.S. 273 (1906). In that case, this Court held that the State of South Carolina had voluntarily waived its Eleventh Amendment defense to a prior judgment entered in federal district court and therefore could not reassert that defense in a second suit involving the same claim. 200 U.S. at 292.

The panel majority also erred by contending that the holding of *USF&G* is inconsistent with *Nevada* v. *United States*, 463 U.S. 110 (1983), and *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165 (1984). In *Nevada*, the Supreme Court applied res judicata against the United States in a case involving adjudication of water rights; the case did not involve any issue concerning unlitigated claims of sovereign immunity. *Stauffer Chemical Co.*, like *Montana*, involved collateral estoppel, not claim preclusion.

309 U.S. at 515. Nothing in *Montana* suggests that the Court intended to overrule *USF&G* or to abandon the established rule that unlitigated claims of "sovereign immunity" may be asserted as an exception to the doctrine of *res judicata*.

3. Because the claim of the United States in this case was not barred by the doctrine of *res judicata*, the court of appeals should have reached and ruled upon the merits of the case. There is, however, a conflict among the courts of appeals on that substantive issue, as well as on the *res judicata* issue. If the Court grants certiorari, and determines that *res judicata* does not bar the assertion of the government's claim, the Court should therefore also reach the merits of this case and resolve the conflict among the circuits on the federal question whether a statutory consent to the imposition of "taxes" should be read to include "penalties and interest."

a. By allowing state and local governments to impose "taxes" on certain types of federal property under 40 U.S.C. 602a(d), Congress did not also consent to the imposition of penalties and interest under state law or to foreclosure sales of federal property. "[I]n the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. * * * There can be no consent by implication or by use of ambiguous language." *United States* v. *New York Rayon Importing Co.*, 329 U.S. at 658-659. See also *Library of Congress* v. *Shaw*, 478 U. S. at 314-316. That same principle applies with equal force to penalties. See *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992). Moreover, any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *United States* v. *Nordic Village, Inc.*, 503

U.S. 30, 34 (1992); *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). Applying these settled principles, the district court correctly concluded in this case that a consent to the imposition of state and local "taxes" is not an unambiguous waiver of immunity from state-law penalties and interest and does not authorize foreclosure sales of federal property. App., *infra*, 50a-57a.

In *Lewis County* v. *United States*, 175 F.3d 671 (1999), petition for cert. pending, No. 99-48, the Ninth Circuit considered a similar federal statute that authorizes state and local "taxation" of land held by the Farm Service Agency of the United States (7 U.S.C. 1984). Applying the same reasoning as the district court in the present case, the Ninth Circuit held that state-law penalties and interest are not within the scope of the waiver because the statute "does not *unequivocally* include the assessment of interest and penalties." 175 F.3d at 677. In reaching that conclusion, however, the Ninth Circuit noted that its decision was in conflict with the decision of the Fourth Circuit in *Federal Reserve Bank* v. *Richmond*, 957 F.2d 134 (1992). In the *Richmond* case, the Fourth Circuit had before it a federal statute that consented to state and local "taxes upon real estate" owned by Federal Reserve banks (12 U.S.C. 531). The court held in *Richmond* that the term "taxes" in that statute should be interpreted consistently with the state definition of "taxes," which encompassed penalties and interest as well as basic tax charges. The court reasoned in *Richmond* that Congress should not be understood to have permitted the States "to tax the real property of the Federal Reserve banks and yet require them to alter their settled practices concerning the collection of these taxes." 957 F.2d at 137. In reaching that conclusion, the Fourth Circuit correctly noted that its decision was

"in agreement with" (*ibid.*) the decision of the Fifth Circuit in *Reconstruction Finance Corp.* v. *Texas*, 229 F.2d 9, cert. denied, 351 U.S. 907 (1956), which held that a statute that authorizes "taxation" of federal property incorporates "settled State rules in determining whether the word 'taxation' * * * includes penalties and interest." 229 F.2d at 11. In *Lewis County*, the Ninth Circuit stated that it "disagree[s] with the approach of the Fourth and Fifth Circuits" in the *Reconstruction Finance* and *Richmond* cases. 175 F.3d at 677.[14]

As these cases reflect, several federal statutes authorize the imposition of state and local "taxes" on specific kinds of federal property. The proper interpretation of the scope of the federal statutory consent to state and local "taxes" is a matter of recurring importance on which the courts of appeal are in open and acknowledged conflict. A remand of this issue to the Seventh Circuit would not dissipate or resolve that conflict. It would instead enlarge the conflict by enmeshing another circuit in the dispute. Review by this Court of this recurring issue would avoid continuing uncertainty and disparate application of these frequently applied revenue laws.

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[14] In an alternative holding, the court further noted in *Lewis County* that "the County would fare no better" even under the approach applied in the *Reconstruction Finance* and *Richmond* cases, for interest and penalties are not "a part of the tax" under the state law that applied in that case. 175 F.3d at 677 n.6 (quoting *Henry* v. *McKay*, 3 P.2d 145, 148 (Wash. 1931)). As the Ninth Circuit correctly concluded in *Lewis County*, resolution of the conflict among the circuits concerning the scope of the statutory waiver would not affect the proper outcome in that case. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1107

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

COUNTY OF COOK, ILLINOIS, ET AL.,
DEFENDANTS-APPELLANTS

[Argued Sept. 14, 1998
Decided Feb. 4, 1999]

Before EASTERBROOK, RIPPLE, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

This long-running dispute about real estate taxation of two buildings in which the United States was a tenant was resolved by *United States v. Hynes*, 20 F.3d 1437 (7th Cir.1994) (en banc). Or so we thought. But the United States now contends that because its lawyers neglected to invoke sovereign immunity it is entitled to a fresh adjudication. Needless to say, the taxing authorities reply that claim preclusion (res judicata) cannot be avoided by raising new arguments; judgments are conclusive not only with respect to arguments actually made, but also with respect to arguments that could have been made. *Nevada v. United*

States, 463 U.S. 110, 129-30, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83-85, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Cromwell v. County of Sac*, 94 U.S. 351, 24 L.Ed. 195 (1876); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 913 (7th Cir.1993). We must decide whether there is a sovereign-immunity exception to this rule.

Hynes explains the essential facts, so we can be brief. Although state and local governments usually cannot tax transactions or entities in which the United States has a beneficial interest, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), Congress has consented to the taxation of real estate when the United States has entered into a financing lease. 40 U.S.C. § 602a(d). Two federal buildings in Chicago were constructed under this program. Construction funds were advanced, and title was held, by private investors until the United States exercised its option to purchase outright. Cook County sought to collect real estate taxes based on the value of each building, and despite § 602a(d) the United States invoked intergovernmental tax immunity. A panel of this court sustained that defense, *United States v. County of Cook*, 725 F.2d 1128 (7th Cir.1984), but after a change in the local tax statutes the full court overruled the panel's decision and held that § 602a(d) relinquishes any immunity the United States otherwise would enjoy. After our decision the United States prepaid the leases for the remaining years and took title to both buildings, which stopped the accrual of taxes (and avoided any possibility that the buildings would be sold to satisfy unpaid tax bills). When title changed hands, the United States owed more than $65 million in taxes, interest, and penalties for 1985-93. Cook County has not sought

to collect for earlier years, but the United States insists that despite our opinion it need not pay the balance. It has tendered the principal amount of taxes but refuses to pay more, observing that sovereign immunity bars interest and penalties against the United States unless Congress has authorized these remedies explicitly. *Department of Energy v. Ohio*, 503 U.S. 607, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992) (penalties); *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (interest).

Section 602a(d) refers only to "taxes" and therefore, the United States insists, does not encompass interest and penalties for delayed payment of taxes. This argument could have been made in prior proceedings but was not. By the time the United States brought its action substantial interest and penalties had accrued, and more were in prospect. Some of the penalties are attributable to the sale of the County's tax claims under state law, but this does not affect the scope of preclusion. Objections to all penalties available under state and local law could have been asserted in the prior litigation. Every legal theory pertaining to one transaction is part of a single claim. E.g., *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir.1993); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320 (7th Cir.1992); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir.1986). Although an effort to sell the buildings *today*, after the United States has acquired title, would generate a new claim, the County does not seek such relief. Only money is at issue. All of the financial consequences of nonpayment were, or could have been, addressed in the earlier litigation, and all are therefore part of the same claim. The arguments the United States now advances are

foreclosed by normal principles of preclusion unless these have a sovereign-immunity exception. The district court held, 1997 U.S. Dist. LEXIS 15993, 1997 WL 639049, that they do. Reaching the merits, the court concluded that, despite *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946), and *Federal Reserve Bank v. Richmond*, 957 F.2d 134 (4th Cir.1992), interest and penalties are not comprehended in the authorization of "taxes."

Two preliminary matters require attention. First is the oddity that each side has filed an appeal to a different court. Cook County and its tax officials have appealed to us. The United States took an appeal to the Federal Circuit from the portion of the district court's order that transferred to the Court of Federal Claims two legal arguments that the district court thought were based on the takings clause of the fifth amendment, and therefore came within the Court of Federal Claims' exclusive jurisdiction. We inquired at oral argument how a single judgment could be appealed to two circuits and why, if part of the case is indeed within the Court of Federal Claims' jurisdiction, the whole appeal does not lie to the Federal Circuit under 28 U.S.C. § 1295(a)(2). The answer to the second inquiry is that § 1295(a)(2) directs an appeal to the Federal Circuit only when the district court's jurisdiction depends on a statute listed in that subsection. In our case jurisdiction depends on 28 U.S.C. § 1345, which authorizes suit by the United States. Takings theories were injected as counterclaims, which do not change the jurisdictional foundation of the suit and therefore do not redirect the appeal. As for the first inquiry: 28 U.S.C. § 1292(d)(4)(A) gives the Federal Circuit exclusive jurisdiction of any appeal from an order transferring

"an action" to the Court of Federal Claims under 28 U.S.C. § 1631. It is doubtful that the district court has transferred "an action", for a legal theory is not an "action" or even a claim for relief; that's the point of our treatment of preclusion; moreover, the partial transfer is problematic under 28 U.S.C. § 1500. So it may well be that the Federal Circuit lacks jurisdiction. We are confident, however, that we have jurisdiction of the County's appeal.

The second preliminary issue is whether sovereign immunity has anything to do with the problem at hand. Arguments before the panel in 1984, and the en banc court in 1994, concentrated on intergovernmental tax immunity for a reason: the County has not imposed a tax on the United States. Taxes must be paid by the buildings' legal owners. No rule of *sovereign* immunity prevents state and local governments from collecting taxes from landlords, banks, and other firms that do business with the United States. Only the principle of intergovernmental tax immunity, which interdicts some (though not all) taxes whose economic incidence is borne by a governmental body, could block collection, and it is this principle that the United States sought to vindicate in the earlier suits. Apparently the United States promised the builders and banks that it would pay any taxes ultimately determined to be required, but a contractual indemnity does not set up a claim of sovereign immunity. Taxes, interest, and penalties are imposed on the buildings' owners, and if they paid Cook County and the United States refused to reimburse them, that would lead to a simple contract suit in the Court of Federal Claims, a suit for which sovereign immunity has been waived by 28 U.S.C. § 1491(a)(1).

Many state and local governments indemnify their employees in actions under 42 U.S.C. § 1983. We held in *Gary A. v. New Trier High School District*, 796 F.2d 940, 945 (7th Cir.1986), and *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir.1985), that a state's assumption of private liability does not convert the action into one against the state and permit invocation of the eleventh amendment. Equally, one would suppose, the United States' undertaking to pay taxes on behalf of a private party does not make the action against this party one against the United States, and therefore does not permit the United States to assert sovereign immunity in order to thwart the obligation that it has agreed to reimburse. But Cook County does not make an argument along these lines, and we therefore proceed on the assumption that sovereign immunity has some bearing on the litigation—though it should be clear from this discussion that it is only an assumption, which bears examination if a similar problem recurs.

For a long time it has been understood that the United States, like a private litigant, cannot relitigate claims that have reached final judgment. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984); *United States v. Moser*, 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924). (The special treatment of offensive nonmutual issue preclusion, see *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), does not qualify this rule when identical parties contest the sequential suits.) Likewise it is settled that a "claim" for purposes of this rule means all legal theories bearing on a set of facts; an omitted argument cannot be raised later. *Nevada v. United States*, 463 U.S. at 129-30, 103 S.Ct. 2906. To create a sovereign-immunity exception to these princi-

ples would be to abolish them, for *every* suit involving the interests of the United States potentially involves sovereign immunity. What it means to say that the United States possesses sovereign immunity is that there is no common-law or equitable liability. *OPM v. Richmond*, 496 U.S. 414, 424-26, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990). Relief depends on statutes, which should not be read to expose the United States to liability unless Congress makes a remedy available explicitly. *United States v. Sherwood*, 312 U.S. 584, 589-91, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *United States v. Testan*, 424 U.S. 392, 399-403, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 738-41, 102 S.Ct. 2118, 72 L.Ed.2d 520 (1982); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *FDIC v. Meyer*, 510 U.S. 471, 475-83, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994); *Pullman Construction Industries, Inc. v. United States*, 23 F.3d 1166 (7th Cir.1994). Thus *every* statute authorizing the courts to adjudicate claims to property or funds of the United States is a waiver of sovereign immunity, and *every* argument that the United States makes (or omits) in defense is in the end an argument about sovereign immunity. Even prospective relief depends on the waiver of sovereign immunity in 5 U.S.C. § 702. Compare *Bowen v. Massachusetts*, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), with *Department of the Army v. Blue Fox, Inc.*, ___ U.S. ___, 119 S.Ct. 687, _____ L.Ed.2d _____ (1999).

Consider a suit under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80. The plaintiff says that he received negligent medical treatment in a veterans' hospi-

tal; the United States denies that the treatment was negligent; after a trial the judge rules in the plaintiff's favor and awards damages. Must the United States pay? One would suppose so; but if there is a sovereign-immunity exception to the law of judgments then it need not. Instead the United States could balk, force the plaintiff to sue to enforce the judgment, and assert some additional defense—say, that the administrative claim or suit was untimely under 28 U.S.C. §§ 2401(a) and 2675(a). Because the FTCA waives sovereign immunity, each limitation presents a question about the extent of the waiver. See *United States v. Kubrick*, 444 U.S. 111, 117-18, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). See also *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). If there is a sovereign-immunity exception to claim preclusion, then the United States could make its timeliness defense in a second suit. And if it lost that suit, it *still* could refuse to pay and insist that the plaintiff file a third suit in order to address the discretionary-function exception to liability, 28 U.S.C. § 2680(a), a fourth to overcome the intentional-tort exception, § 2680(h), and so on *ad infinitum*. At oral argument counsel for the United States candidly conceded that this is a logical consequence of the position the government advances.

It is a most unpalatable consequence—likely an unconstitutional one. For it would reduce to advisory status all decisions adverse to the financial interests of the United States. If the United States thinks that it has a new and better argument, it would be free to ignore the judgment and go on as before. That prospect led the Supreme Court to hold that federal courts may

not decide veterans' claims under a statute that left their decisions subject to administrative approval. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792). Justice Kennedy worried last spring that permitting a government to raise sovereign immunity for the first time on appeal would allow it "to proceed to judgment without facing any real risk of adverse consequences." *Wisconsin Department of Corrections v. Schacht*, ____ U.S. _____, 118 S.Ct. 2047, 2055, 141 L.Ed.2d 364 (1998) (concurring opinion). How much worse if the governmental body *never* had to raise the defense in the first litigation, but could simply ignore the judgment and insist that its adversary try again! That approach is not compatible with the Constitution, for Article III courts exercise the "judicial Power of the United States"—which is to say, a power to enter judgments that are conclusive between the parties. *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 218-19, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). Although the raw power of Congress to withhold appropriations means that a given judgment requiring the United States to pay money may be unenforceable, this remote possibility does not render all judgments advisory. *Glidden Co. v. Zdanok*, 370 U.S. 530, 571, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (plurality opinion). But the position taken by the United States in this case would make judgments contingent on the inability of federal lawyers to think up a new theory. Many a lawyer comes to believe, after a case is over, that a better line of argument was available. If the United States is right, then it is entitled to as many bites at the apple as it finds necessary, until it has prevailed or exhausted all available lines of argument.

Our point is not that exceptions to claim preclusion, and the possibility of collateral attacks on judgments, make decisions "advisory" as a rule. Judgments adverse to private litigants have consequences unless upset. Execution will issue on a money judgment, and the losing party's assets will be sold if the judgment is not paid. A criminal conviction leads to imprisonment, and the possibility that the prisoner may be entitled to relief on a collateral attack does not make the commitment to prison "advisory", even though the duration of custody may be affected by collateral attacks. What is special about litigation involving the financial interests of the United States, however, is that the judgment does not authorize execution on assets. The marshal will not sell a national park at auction or confiscate an aircraft carrier to satisfy the claim—and the decision to prepay the leases and take title to the buildings prevented Cook County from collecting by selling the privately-owned buildings. See *J.W. Bateson Co. v. United States*, 434 U.S. 586, 589, 98 S.Ct. 873, 55 L.Ed.2d 50 (1978) (liens "cannot attach to Government property"). Enforcement thus depends, as Justice Harlan's plurality opinion in *Glidden* emphasized, on the good-faith cooperation of those officials in the political branches of government who are authorized to write checks on the Treasury. If these same officials are entitled to disregard a judgment when they conclude that the government's lawyers did not make the appropriate arguments, then the premise of *Glidden* no longer holds, and the judgment has been rendered advisory.

But of course this is not the first time that a governmental body has argued that it can keep litigating, and the Supreme Court has responded that judgments have teeth. Two taxation cases illustrate. South Caro-

lina enacted a statute exempting a railroad's property from taxation. Several counties nonetheless attempted to collect property taxes from the railroad, and an investor filed suit in federal court seeking a declaration that the taxation was impermissible. The state intervened to argue in support of the taxes and lost on the merits when the Supreme Court held that the statute entitled the railroad to a complete property-tax exemption. When the state later enacted and attempted to enforce a statute that would permit the counties to collect 10 years' worth of property taxes, it was met with an argument that the propriety of taxation had been resolved already, to which the state replied (among other things) that the first judgment was ineffectual because it had not surrendered its immunity under the eleventh amendment to suit in federal court. Yes, it had, the Court concluded in *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 26 S.Ct. 252, 50 L.Ed. 477 (1906). By intervening in the initial case yet omitting any argument based on the eleventh amendment, the state surrendered the option of making such an argument in a later case. A state, the Court held, "cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id.* at 284, 26 S.Ct. 252. See also *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S.Ct. 467, 91 L.Ed. 504 (1947); *Missouri v. Fiske*, 290 U.S. 18, 24-25, 54 S.Ct. 18, 78 L.Ed. 145 (1933); *Clark v. Barnard*, 108 U.S. 436, 447-48, 2 S.Ct. 878, 27 L.Ed. 780 (1883). Just so, one would think, with the United States, which as the plaintiff in a suit seeking to enjoin Cook County's taxation of the two buildings is poorly situated to contend that sovereign immunity protects it from an adverse outcome.

The other example is *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Montana imposed a gross receipts tax on builders of public construction projects. The United States directed the contractor on a federal dam project in Montana to file suit in state court in an effort to have the tax declared invalid. The firm sued and lost. Later the United States filed its own action in federal court seeking an injunction against collection of the tax from its contractors, only to be met by a defense of preclusion. The Supreme Court held that the United States was not entitled to litigate a second time. The contractor served as its proxy in the first suit, the Court held, which meant that the judgment had the same preclusive effect as if the United States itself had been the litigant. Yet if the United States is right in our case, *Montana* should have come out the other way, for the contractor did not assert sovereign immunity and as a private firm could not have done so. *Montana* could be chalked up as a case in which the United States did not argue for a sovereign-immunity exception—but then perhaps the Solicitor General saw little merit to an argument that claim preclusion has a sovereign-immunity exception. No matter. *Montana* illustrates the normal application of res judicata to successive suits involving the taxation of firms that furnish goods or services to the United States.

The foundation of the United States' current position is that agents of the Executive Branch, including its lawyers, cannot waive the sovereign immunity of the United States. Only Congress and the President, acting together through legislation, may do so. See also Art. I § 9 cl. 7: "No Money shall be drawn from the

Treasury, but in Consequence of Appropriations made by Law". Giving legal effect to an attorney's failure to make a sovereign-immunity argument would permit that attorney to waive the immunity of the United States, the argument concludes. The problem with this argument lies not in its premises but in the expression of its conclusion—for a court does not "give effect" to attorneys' arguments (or silence). It is the judgment of the court, and not of the attorneys, that has legal effect. A court with authority to consider and reject an invocation of sovereign immunity also has authority to enter judgment adverse to the interests of the United States without "waiving" (or violating) that immunity.

To see this consider a close parallel: rulings that concern (or suppose the existence of) subject-matter jurisdiction. No court may decide a case without subject-matter jurisdiction, and neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction. If the parties neglect the subject, a court must raise jurisdictional questions itself. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988); *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir.1998). But if the court decides a case on the merits after an adversarial presentation, the judgment cannot be collaterally attacked on the ground that the court lacked subject-matter jurisdiction. The parties' failure to address jurisdiction fully or cogently does not deprive the judgment of force. *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963). Indeed, the parties' failure to address a jurisdictional issue at *all* does not diminish the authority of the judgment. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456

U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) ("A party that has had *an opportunity* to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment.") (emphasis added); *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 705-10, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *In re Edwards*, 962 F.2d 641, 644 (7th Cir.1992); cf. *Swift & Co. v. United States*, 276 U.S. 311, 326, 48 S.Ct. 311, 72 L.Ed. 587 (1928). The *Restatement (2d) of Judgments* (1982) recognizes exceptions to this norm, but none is applicable to the ordinary case in which, say, the parties fail to notice the lack of complete diversity of citizenship:

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if: (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Restatement § 12. There is another, and more commonly used, exception to the principle that a court's jurisdiction may not be collaterally attacked. A party that simply refuses to appear may contend in a later case that the first tribunal lacked jurisdiction—though jurisdiction is the *only* issue thus preserved, and if the first court had jurisdiction then the judgment must be enforced. See *Earle v. McVeigh*, 91 U.S. 503, 507, 23 L.Ed. 398 (1875); *Williams v. General Electric Capital Auto Lease, Inc.*, 159 F.3d 266 (7th Cir.1998); *Metropolitan Life Insurance Co. v. Cammon*, 929 F.2d 1220, 1222-23 (7th Cir.1991). The exception is necessary because otherwise a court that lacked jurisdiction could strong-arm a party to litigate the subject, decide in favor of its own power, and thus block any review of its adjudicatory competence. Notice, however, that none of these exceptions has anything to do with the rule that parties may not waive jurisdictional shortcomings or stipulate to jurisdiction. A final judgment is the work of the court, not of the parties, and as a court has jurisdiction to determine its own jurisdiction it may decide the subject; whether it does so expressly or by implication the decision ordinarily is conclusive. Cf. *Baltimore & Ohio Chicago Terminal R.R. v. Wisconsin Central Ltd.*, 154 F.3d 404, 412 (7th Cir.1998). This approach is essential if judgments are to resolve the parties' disputes, rather than just set the stage for the next act.

If the rule that jurisdictional issues cannot be waived or forfeited by counsel does not permit a party that has litigated the merits but neglected a jurisdictional objection to wage a collateral attack, why should the principle that sovereign immunity cannot be waived or forfeited by counsel permit a party that has litigated the

merits but neglected a sovereign-immunity objection to wage a collateral attack? For most purposes it overstates the strength of sovereign immunity to analogize it to a lack of jurisdiction. Any difference between the two should make it easier to raise a jurisdictional objection belatedly than to raise a sovereign-immunity objection belatedly. As we have explained, what sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief. See *Irwin*, 498 U.S. at 95-96, 111 S.Ct. 453. Our opinion in *Hynes* interpreted § 602a(d) to allow Cook County to tax the two buildings using the same rules that apply to real estate in which the United States is not a tenant. That may be right or wrong, but it was within the court's subject-matter jurisdiction (recall that the United States was the plaintiff, so 28 U.S.C. § 1345 supplied jurisdiction). The United States had an opportunity to make a sovereign-immunity argument in a tribunal authorized by law to hear and decide that argument; it could not help itself to another go-round by failing to make an argument in the appointed place at the appointed time.

Despite all of this, the district judge wrote that a sovereign-immunity "exception to res judicata has a long, unbroken history." 1997 U.S. Dist. LEXIS 15993 at *36, 1997 WL at *9. Cases such as *Gunter* and *Montana* show that "unbroken" is not an apt description. As for "long": the district court cited only two decisions of the Supreme Court. One is *Durfee*, which holds that questions of subject-matter jurisdiction litigated and resolved adversely to a party are covered by res judicata. This hardly establishes a sovereign- immunity

exception to claim preclusion (not only because the Court rejected an argument for an exception, but also because sovereign immunity had not been invoked in *Durfee*), but on the way to decision the Court made this remark:

> To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb v. Feuerstein; United States v. United States Fidelity & Guar. Co.* But no such overriding considerations are present here.

375 U.S. at 114, 84 S.Ct. 242 (footnote omitted). "[M]ay in some contexts" poses but does not answer the question "in *which* contexts?" For the answer one must turn to *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (*USF&G*), the second case on which the district judge relied. (*Kalb*, the other case cited in *Durfee*, is irrelevant to our problem; it concerns the effect of the automatic stay in bankruptcy law.)

In *USF&G* the United States, as trustee for the Choctaw and Chickasaw Nations, filed a claim for $2,000 in the bankruptcy of the Central Coal & Coke Company. The coal company responded with a cross-claim for some $11,000, which the United States ignored—for claims against Indian tribes had to be filed in a "United States court in the Indian Territory", a category to which the bankruptcy court did not belong. Nonetheless the referee in bankruptcy allowed the coal company's claim, leaving it the Tribes' judgment creditor to the tune of $9,000. When the coal company attempted to enforce this judgment, the United States

resisted on immunity grounds. After assimilating the sovereign immunity of Indian tribes to that of the United States (see *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)) the Court observed: "No statutory authority granted jurisdiction to the Missouri Court [i.e., the referee in bankruptcy] to adjudicate a cross-claim against the United States." 309 U.S. at 512, 60 S.Ct. 653. After additional exposition the Court declared the referee's decision "void" to the extent it awarded the coal company relief in excess of setting off the original $2,000 claim. The Court's analysis has two strands. One emphasizes the referee's lack of subject-matter jurisdiction and the other the Tribes' sovereign immunity, neither of which attorneys could waive. This second strand is the peg on which the United States now hangs its hat. Some language in *USF&G* supports that understanding. Other language supports the view that the Court thought of the case as one combining the absence of subject-matter jurisdiction with a litigant's disdain of the tribunal—a combination that traditionally permits a collateral attack (though one limited to the jurisdictional issue).

Which is the right way to understand the case? One clue is the Court's thoroughgoing equation of sovereign immunity to a jurisdictional shortcoming—for this suggests that the rule giving effect to a court's determination of its own jurisdiction carries over to potential sovereign immunity defenses. A second clue is the Court's statement of the questions presented:

> This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without

> statutory authority, fixing a balance of indebtedness to be collected as provided by law, res judicata in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

309 U.S. at 509, 60 S.Ct. 653. This puts the case squarely in the jurisdictional camp and supports a reading that it was the referee's lack of subject-matter jurisdiction, rather than counsel's failure to advance a sovereign-immunity defense before the referee, that made the judgment void. On that understanding *USF&G* offers the United States no aid, for the subject-matter jurisdiction of the district court (and this court) in *Hynes* is beyond doubt. Still a third reason for thinking that *USF&G* is about subject-matter jurisdiction rather than a sovereign-immunity exception to the enforcement of judgments is the dire effect of the latter reading, which would make res judicata all but disappear for claims against the United States and make many judgments advisory in the process. The Court did not suggest that its decision had such a sweeping effect, and no later case imputes that consequence to *USF&G*. Indeed, the opinion in *USF&G* vanished from the law of judgments as soon as the ink dried on volume 309 of the United States Reports. Other than the elliptical reference in *Durfee*, the case has been cited by the Supreme Court only for the

proposition that Indian tribes possess sovereign immunity. Opinions such as *Montana*, *Nevada*, and *Stauffer Chemical* do not cite or distinguish *USF&G*, though it would have been a major stumbling block to those decisions if it had the effect that the United States now attributes to it.

USF&G is the beginning and end of the Supreme Court cases on which the United States relies. We conclude that *USF&G* does not protect the United States from the risk of losing a case it brought on its own behalf in the proper court. *USF&G* permits the United States to ignore proceedings instituted against it in the wrong court. It has used this privilege to ignore proceedings in the Circuit Court of Cook County to collect the real estate taxes; *USF&G* protects the United States from the *ex parte* judgments entered in those cases, but not from the loss in its own suit. None of the other cases that the district court cited holds that the United States may initiate a case in a court that possesses subject-matter jurisdiction, vigorously contest the merits, and then refuse to accept defeat on the ground that its lawyers did not adequately argue sovereign immunity. Some of these cases, such as *Department of the Army v. Federal Labor Relations Authority*, 56 F.3d 273 (D.C.Cir.1995), did not even involve judgments. (The supposed "waiver" in that case occurred before the FLRA, and the court of appeals held that the extent of sovereign immunity was open to judicial review when the dispute finally reached a court.) Other cases involved claims filed in the wrong court, as in *USF&G* itself, or against the wrong parties, as in *Sterling v. United States*, 85 F.3d 1225 (7th Cir.1996). None was similar to the pattern of litigation between the United States and Cook County. If as in

Montana the United States had used the banks as stalking horses in the initial rounds of this dispute, it would today be bound by the adverse decision. It is no less bound when it litigates in its own name.

REVERSED.

ILANA DIAMOND ROVNER, Circuit Judge, dissenting.

The majority holds that a claim of sovereign immunity litigated in a prior action cannot be relitigated in a later action. That is not, however, what happened here. The claims before us today were never litigated in *United States v. Hynes*, 20 F.3d 1437 (7th Cir.1994) (*en banc*), and in fact some arguably arose only after *Hynes*. The majority employs the legal fiction that all claims arising from a single transaction are one claim to assert that the government has already argued immunity and cannot do so again. Because I do not think *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) ("*USF&G*"), supports that holding, I respectfully dissent.

A very brief recitation of the facts is necessary. In *Hynes*, the U.S. Government ("Government") brought a declaratory judgment action seeking to preclude Cook County from imposing, assessing, or collecting taxes on real property owned by the Government. The complaint acknowledged that interest and penalties were being imposed as well as taxes, but requested relief only from taxes. Cook County did not file a counterclaim seeking the taxes, interest, or penalties, choosing instead to pursue such judgments in the state court. We rejected the Government's claim of immunity in

Hynes in an *en banc* decision. Cook County obtained judgments in state court against the Government for interest and penalties and orders of tax sale for those properties. The Government did not appear in those state court actions and did not consent to jurisdiction. The Government subsequently filed the declaratory judgment action which underlies this appeal, seeking injunctive and declaratory relief from interest, penalties and tax sales based on principles of sovereign immunity.

At issue before this Court today is whether the failure of the Government to challenge the interest, penalties and tax sales in *Hynes* precludes it from raising the defense of sovereign immunity now. Generally, under the doctrine of res judicata, a prior judgment has preclusive effect over claims that were actually raised or could have been raised in the prior proceeding. Claims that "could have been raised" include those that arose out of the same transaction as the claims that were raised. Although some of the claims in the instant case possibly could not have been raised in *Hynes*,[1] I will assume for purposes of this dissent that all claims raised here could have been raised in *Hynes*. None of the claims in the present case, however, were actually litigated in *Hynes*. The general rule of preclusion is subject to exceptions, one of which is set forth in *USF&G* and which applies in this case.

In *USF&G*, the Supreme Court held that collateral estoppel did not preclude the Government from raising

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[1] For instance, the government challenges the computation of interest and penalties that occurred after *Hynes*, and challenges post-*Hynes* tax sales.

a sovereign immunity defense to a royalties claim that had been actually decided in a prior case brought by the Government. 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894. In the earlier action, the Government had not presented any sovereign immunity defense, and the court had decided the royalties claim adversely to the Government. *Id.* at 510, 60 S.Ct. 653 The Government subsequently brought another action, and a party argued that the Government was collaterally estopped from challenging the first decision. *Id.* at 511, 60 S.Ct. 653. The Court held, however, that the immunity of the United States cannot be waived by the action of government officials—specifically, by the failure of those officials to raise the sovereign immunity defense in the preceding action. *Id.* at 513-14, 60 S.Ct. 653. That was because consent to be sued could only be granted by Congress. *Id.* at 514, 60 S.Ct. 653. The Court further held that "[t]he reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. . . . Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Id.* at 514, 60 S.Ct. 653 When faced with the "collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit . . . [w]e are of the opinion . . . the doctrine of immunity should prevail." *Id.* at 514-15, 60 S.Ct. 653. The Court explicitly stated that the "desirability for complete settlement of all issues between parties must . . . yield to the principle of immunity." *Id.* at 513, 60 S.Ct. 653.[2]

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[2] The majority dismisses *USF&G* by characterizing the holding as based on principles of subject matter jurisdiction rather than

We are presented with a similar situation in this case. The Government in this case failed to raise any challenge regarding interest, penalties, and tax sales in *Hynes*. As in *USF&G*, however, the failure of the Government to raise a sovereign immunity claim cannot waive the Government's immunity. The principles of res judicata that would prevent the Government from raising immunity now cannot control where there is a clash between the immunity interest and the desire for finality of judgments. *Id.* at 513-14, 60 S.Ct. 653. Arguably, this case is even stronger than *USF&G*, because there the royalties claim was actually decided by the Court while the government stood mute regarding its immunity rights. In this case, no court has addressed the claims regarding interest, penalties, and tax sales,[3] and the interest in finality of judgments is presumably weaker.

Ultimately, the majority refuses to distinguish between claims actually litigated and those that could

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sovereign immunity. A plain reading of that case suggests otherwise. *See, e.g.*, Wright and Miller, FEDERAL PRACTICE AND PROCEDURES § 4429 (stating that *USF&G* was not based on jurisdiction but rather "[t]he decision rested solely on the ground of sovereign immunity and the doctrine that sovereign immunity cannot be waived."). Moreover, I cannot agree that "it overstates the strength of sovereign immunity to analogize it to lack of jurisdiction," with the former being of less weight than the latter. *See* Maj. Op. at 388-89. The principle of sovereign immunity has been afforded much more protection—and respect—by the courts than the majority would afford it here.

[3] And in fact, the government often retains immunity from interest even if it consents to waive immunity regarding the underlying judgment. *See Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). As in this case, the immunity analysis may be very different regarding the two.

have been raised, holding that they are all one claim. Because they are considered one claim, the majority asserts that the government cannot litigate an immunity claim and then bring a subsequent action asserting a second immunity claim. Moreover, from this premise the majority expresses the fear that the Government could raise its attacks on a judgment piecemeal. This is not, however, a challenge to the obligation to pay taxes, which was decided in *Hynes*. If the Government unveiled a "new" immunity challenge to the taxes, such as is envisioned in the majority opinion, then a different result might be required. *USF&G* does not necessarily require that the Government be allowed to argue its immunity defense multiple times. The Supreme Court hinted as much in *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963):

> To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894.[12]
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> [12] It is to be noted, however, that in neither of these cases had the jurisdictional issues been *actually litigated* in the first forum. . . . .

375 U.S. at 114, 84 S.Ct. 242 (emphasis added).

The claims in the present case, however, were not actually argued in *Hynes*. We are instead presented with an immunity challenge regarding claims that

arguably could (and should) have been presented in *Hynes* but were not. This is not a second bite at the tax decision. It is a first bite at penalties, interest, and tax sales. The only question is whether the failure of the Government attorneys to raise it in the prior case can preclude the Government from now asserting immunity to those subsequent state court judgments. *USF&G* establishes that the failure of a government official to assert an immunity claim that could have been made does not preclude the Government's later assertion of that claim. The right of immunity supersedes the interest in adjudication of all related issues in a single case. Just as the Government officials could not consent to waive immunity by failing to raise the immunity defense in *USF&G*, they could not consent to waive immunity by failing to raise the interest, penalties and tax sales claims in this case. Although I am dismayed by the protracted approach taken by the Government, I am constrained by *USF&G* to conclude that the Government is not precluded from pursuing the claims in this case. If *USF&G* is to be reconsidered or limited, that remains the province of the Supreme Court. Because I agree with the district court's conclusions on the merits, I would affirm the decision of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 7068

UNITED STATES OF AMERICA, PLAINTIFF

v.

COUNTY OF COOK, ILLINOIS, ET AL., DEFENDANTS

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
COUNTERPLAINTIFFS

v.

UNITED STATES OF AMERICA,
COUNTERDEFENDANT

[Oct. 3, 1997]

MEMORANDUM OPINION AND ORDER

HONORABLE DAVID H. COAR

Before the court are the plaintiff/counterdefendant United States of America's ("USA") and defendant/ counterplaintiff County of Cook's ("County") October 1, 1997 cross-motions for summary judgment on the USA's complaint and on the County's counterclaims.

For the following reasons, the USA's motion for summary judgment will be GRANTED both as to claims and counterclaims and the County's cross-motion for summary judgment will be DENIED.

I. Undisputed Facts

The parties have largely stipulated to the relevant facts. For more than two decades, the two properties at issue, the Harold Washington Social Security Center ("Chicago SSC") and the National Archives and Records Administration ("Records Center") (collectively, "the subject properties"), have been a source of contention between the USA and the County. The USA, acting through the General Services Administration ("GSA") under the Public Buildings Act Amendments of 1972, 49 U.S.C. § 602a, purchased and acquired title to the two buildings from 1977-93. (U.S. 12(M) ¶ 8.) The construction of the Chicago SSC and other payment centers was financed through proceeds from debt securities called "participation certificates"; the USA had Citibank hold title as security while installment payments were made to repay the certificates, and Citibank also had a leasehold interest in the federally owned land underlying the Chicago SSC as additional security. (U.S. 12(M) ¶ 11.) The contract for the construction and financing of the Chicago SSC involved a 30-year payback period through 2003 with a unilateral prepayment option in the USA, automatic defease of Citibank's interest in the Chicago SSC and loss of its leasehold once participation certificates were paid off, and the requirement that the trustee make clear upon the public records that the trustee's interest in Chicago SSC was transferred. (U.S. 12(M) ¶ 12.) The Chicago SSC was used and occupied solely by agencies of the U.S. for official Federal Government purposes at all

relevant times, and the USA was the equitable owner of the Chicago SSC even when not the legal owner. (U.S. 12(M) ¶ 13.) On February 1993, the USA refinanced and repaid the participation certificates through the wholly owned Federal Financing Bank; Citibank transferred legal title to the Chicago SSC via quitclaim deed, recorded August 18, 1994. (U.S. 12(M) ¶ 14.)

The USA entered into three agreements regarding the construction and financing of the Records Center: a contract in 1972 with the Pathman Construction Co. to finance, construct, and sell the Records Center, a trust agreement in 1972 with the American National Bank and Pathman, and a contract with the American National Bank and Pathman on November 17, 1993 to purchase the Records Center. (U.S. 12(M) ¶ 16.) In the purchase contract with Pathman, Pathman agreed to build the Records Center, finance its construction, and sell it to USA through installment payments over 30 years through 2003, with legal title conveyed to the American National Bank, as trustee, to hold as security until full repayment by the USA, at which time the trustee's interest would be extinguished and legal title would vest automatically in the US; the USA had a unilateral prepayment option. (U.S. 12(M) ¶ 17.)

The USA also granted a ground lease to Pathman to facilitate construction and as additional security for payment of the purchase price, with unilateral termination of the lease by the USA immediately upon full payment of the purchase contracts; Pathman assigned the lease to the Amer National Bank. (U.S. 12(M) ¶ 18.) The Records Center has been used and occupied solely by agencies of the USA for Federal Government purposes at all relevant times, and the USA has been the

equitable owner of the Records Center at all times, even when it did not hold legal title. (U.S. 12(M) ¶ 19.) By September 27, 1994, the USA prepaid and terminated the purchase contracts; Pathman executed a special warranty deed dated September 13, 1994 to the USA and the trustee executed a quitclaim deed on September 2, 1994, with the deeds recorded on September 29, 1994. (U.S. 12(M) ¶ 20.)

Buildings acquired pursuant to § 602a are subject to certain state and local taxation under 40 U.S.C. § 602a(d), which states: "With respect to any interest in real property acquired under the provisions of this section, the same shall be subject to State and local taxes until title to the same shall pass to the Government of the United States." (U.S. 12(M) ¶ 21.) Many buildings have been constructed pursuant to § 602a, and the GSA paid local taxes on many of these buildings and now holds title to them. (U.S. 12(M) ¶ 22.) The USA has previously challenged the amount due of taxes on various § 602a buildings but has never contested the fundamental validity, under the United States Constitution or laws or applicable state constitutions or laws of state and local taxes except with regard to the subject properties in Illinois. (U.S. 12(M) ¶ 24.)

From 1977-93 the County assessed *ad valorem* property tax on the value of the subject properties, not including the land on which they are situated, under the Illinois Property Tax Code pursuant to § 602a(d). (U.S. 12(M) ¶ 25.) The County has decided not to seek back taxes for 1975-76 on the Chicago SSC and for 1972-76 on the Records Center (1972-76). (U.S. 12(M) ¶ 26.) Prior to 1994, the USA did not pay any part of the taxes assessed or extended for any tax year as to any Illinois

§ 602a properties. (U.S. 12(M) ¶ 27.) Because the USA did not pay taxes through 1977, the County's Collector applied to the Circuit Court of Cook County for judgment and order of sale against both properties as per § 235a of the Illinois Revenue Act of 1939. Pursuant to judgments and orders of sale against the properties, the County sold the Chicago SSC and the Records Center at tax sales in July and August 1979; the purchasers were issued certificates of purchase pursuant to the Illinois Revenue Act (U.S. 12(M) ¶ 28.) In June 1980, the USA filed suit in the United States District Court for the Northern District of Illinois for a declaratory judgment declaring the Chicago SSC and Records Center exempt from local ad valorem taxation and vacating purported tax sales ("*County of Cook I*"). The individual tax purchasers of the subject properties were named but did not appear and, thus, had defaults against them. (U.S. 12(M) ¶ 29.) The County and its officials did not file a counterclaim in *County of Cook* I seeking taxes, interest, or penalties against the USA but, instead, pursued judgments and orders of tax sales through the Circuit Ct of Cook County. (U.S. 12(M) ¶ 30.) On December 27, 1982, the District Court granted the USA's motion for summary judgment, denied the County's cross-motion for summary judgment, and declared the properties exempt from *ad valorem* taxation "so long as the parcels are being purchased by the federal government under installment contracts pursuant to statutory authority and parcels are being used exclusively for the public purposes of the federal government." (U.S. 12(M) ¶ 32.) The County appealed, and the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court. *United States v. County of Cook*, 725 F.2d 1128 (7th

Cir.1984), *overruled*, 20 F.3d 1437 (7th Cir. 1994). (U.S. 12(M) ¶ 33.)

Prior to, during, and after the litigation in *County of Cook I*, the County's Assessor continued to assess the subject properties for 1979-84; assessments made for 1977-84 are still on the books. When none of the taxes were paid, the County's Collector applied to the Circuit Court of Cook County for entry of judgment and order of sale against the subject properties; the Collector subsequently received the judgment and order of sale and then offered the subject properties at a tax sale. (U.S. 12(M) ¶ 34.) No bids were submitted at the annual tax sales from 1977-84; the subject properties, but not underlying land, were marked in the records as forfeited to the State of Illinois. The USA has not paid any part of the taxes shown on the tax judgment and warrant records, with the full amount due being $49,409,723.23, including $30,402,412 .18 for interest and penalties. (U.S. 12(M) ¶ 35.)

On January 1, 1985, the amended ¶ 500.9a of the Revenue Act, exempting "[a]ll property that is being purchased by a governmental body under an installment contract pursuant to statutory authority and used exclusively for the public purposes of the governmental body, *except such property as the governmental body has permitted or may permit to be taxed*." (U.S. 12(M) ¶ 36.) Subsequently, the County's Assessor kept taxing the subject properties for 1985-89. (U.S. 12(M) ¶ 37.) From 1985-86, the USA and the County maintained a correspondence regarding whether the subject property was exempt from taxation, with the U.S. stating that it was exempt and the County stating that it was not. (U.S. 12(M) ¶ 38.) Then, in April 1988, the United

States brought the action of *United States v. Hynes* which sought (1) a declaratory judgment that the County's officials were prohibited from assessing *ad valorem* taxes on real property owned by the USA because amended ¶ 500-9a unconstitutionally discriminated against the USA and (2) preliminary and prohibitive injunctions prohibiting the County's officials from imposing, assessing, or collecting such taxes. (U.S. 12(M) ¶ 39.) Neither the County nor its officials file a counterclaim in Hynes seeking to collect taxes, interest, or penalties against the USA, but, instead, the County pursued judgments and orders of tax sales through the Circuit Court of Cook County regarding the taxes, interest, and penalties. (U.S. 12(M) ¶ 40 .) From 1985-89, the County's Assessor applied to the Circuit Court for entries of judgment and orders of sale against the subject properties, offered tax liens on the buildings, which, when no bids were offered, were labeled as forfeited to the State of Illinois for each of those years. The USA did not pay any part of the taxes, penalties, or interest, until 1995 and it has not paid any amounts attributable to accrued interest or penalties. (U.S. 12(M) ¶ 41-42.)

The USA and the County and its officials filed cross motions for summary judgment in *Hynes*. The District Court granted the USA's motion for summary judgment on the grounds that the amendment to ¶ 500.9a discriminated against the USA in violation of the Supremacy Clause of the United States Constitution, and the Court severed the amendment from the statute. The Chicago SSC and Records Center remained exempt from taxation under former ¶ 500.9a. 759 F. Supp. 1303 (N.D.Ill.), *reconsideration granted in part*, 771 F. Supp. 928 (N.D. Ill. 1991), *aff'd in part, rev'd in*

part, 20 F.3d 1437 (7th Cir. 1994). The County and its officials filed a motion to reconsider or amend the District Court's summary judgment order, and the USA filed a motion to alter or amend the order seeking to ensure that it would constitute a final judgment and would include declaratory and injunctive relief requested. (U.S. 12(M) ¶ 43.) Upon reconsideration, the District Court held that the USA had not sufficiently perfected its right to exemption for 1986-89 and, thus, the subject properties were taxable for those years. 771 F. Supp. 928 (N.D. Ill. 1991), *aff'd in part*, *rev'd in part*, 20 F.3d 1437 (7th Cir.1994). (U.S. 12(M) ¶ 44-45.) Both sides appealed, with the County and its officials appealing the ruling regarding the 1985 taxes and the U.S. appealing the ruling regarding the 1986-89 taxes. (U.S. 12(M) ¶ 46.) In April 1991, both as part of the April 4, 1991 Motion to Reconsider and as part of a letter in the week of April 22, 1991, the County's officials informed the District Court and the USA that they would keep taxing the subject properties in the absence of an injunction against such taxation and informed the USA that the subject properties would be included in an upcoming "scavenger" tax sale if no injunction prevented it. (U.S. 12(M) ¶ 47.) On April 30, 1991, the County advised the USA that a scavenger sale was unlikely before July or August 1991, and, on July 19, 1991, the County advised the USA that the scavenger sale would not occur prior to October 1991. On July 25, 1991, the USA wrote to the District Court requesting that the motion to reconsider be resolved by October 1991 because otherwise the USA would have to pay the tax absent the injunction. (U.S. 12(M) ¶ 48.) In August 1991, the County's Collector applied to the Circuit Court of Cook County for judgment and order of sale for each of the subject properties and sale was ordered

and scheduled to occur during October and November 1991. (U.S. 12(M) ¶ 49.)

On October 16, 1991, the USA filed *County of Cook II* seeking (1) preliminary and permanent injunctive relief preventing the County's tax officials from conducting any scavenger tax sale and/or foreclosure sale and (2) preliminary and permanent injunctive relief preventing the County's tax officials from assessing, imposing, levying, or collecting, by scavenger tax sale, foreclosure sale, or otherwise, taxes, penalties, or interest on the subject prop for tax years prior to 1986, and (3) preliminary and permanent injunctive relief preventing the County's tax officials from assessing, imposing, levying, or collecting, by scavenger tax sale, foreclosure sale, or otherwise, penalties and interest which the County claimed to be owed by the GSA; the USA also filed for a Temporary Restraining Order preventing the scavenger tax sales. (U.S. 12(M) ¶ 50.) On October 17, 1991, the County's Collector moved to postpone the tax sale of the subject properties until December 1991 in consideration of the ongoing Federal proceedings and sought modification of the prior judgment and order of sale in conformity with the rulings in *County of Cook I* and *Hynes*. The motion was granted, the sales were delayed to December 1991, and the taxes of 1985 and prior years were removed from the tax sale, without prejudice to reinstatement if no longer prevented by court order. (U.S. 12(M) ¶ 51.)

On November 4, 1991, the County's Board of Commissioners resolved to buy the tax liens on the subject properties, in order to secure the collection of any taxes ultimately held lawful and to prevent intrusion into litigation of private tax purchaser, and the Board

extended the period of redemption to December 1994. (U.S. 12(M) ¶ 52.) On November 8, 1991, the County moved to dismiss *County of Cook II* and to deny the TRO on, among other grounds, res judicata. On November 15, 1991, the District Court denied the USA's motion for TRO because of the County's representation that it would purchase the subject tax liens. (U.S. 12(M) ¶ 52-53.) On November 25, 1991, the USA filed notice of voluntary dismissal under Fed.R.Civ.P. 41 in *County of Cook II*, and, on November 27, 1991, the District Court dismissed the action under Rule 41 without stating whether or not the action was dismissed with prejudice. (U.S. 12(M) ¶ 54.) The Circuit Court confirmed the sale to Cook County of the subject properties. The order was subsequently amended on April 28, 1992 to conform to the judgment and order of sale as modified on October 17, 1991. (U.S. 12(M) ¶ 55.)

The Seventh Circuit, seated en banc, reversed *Hynes* regarding the 1985 tax year and affirmed it regarding the subsequent tax years. 20 F.3d 1437 (7th Cir. 1994). (U.S. 12(M) ¶ 56.) The USA did not seek review in the Supreme Court, and final judgment was entered July 28, 1994. (U.S. 12(M) ¶ 57.) On April 20, 1994, the County moved in the Circuit Court of Cook County to include taxes for 1985 in the scavenger tax sale of the subject properties; the Circuit Court granted the motion, added the 1985 taxes, and stated that, because the injunction had been vacated, collection of taxes was to proceed "as though the same . . . had never been enjoined." (U.S. 12(M) ¶ 58.) Taxes for the years of 1990-92 on the Records Center and for 1990-93 (first installment) on the Chicago SSC were included in the amount required to redeem the 2 buildings from the tax sale by the Cook County Clerk. Total sum due from the

USA was for $65,363,289.99, of which $33,160,834.08 was for interest and penalties. (U.S. 12(M) ¶ 59.) On August 19, 1994, the GSA paid the current taxes for the entire year of 1993 on the Record Center and the second installment on the Chicago SSC; there was no further interest or penalties for those periods or successive periods on either building. (U.S. 12(M) ¶ 60.)

The County has served notices upon relevant parties regarding the tax sales of the subject properties. On August 8, 1994, the County filed supplemental petitions with the Circuit Court of Cook County seeking the tax deeds to the subject properties if not redeemed by payment of the delinquent taxes. (U.S. 12(M) ¶ 61.) On November 29, 1994, on the County's motion, the Circuit Court stayed all proceedings pending disposition of the instant complaint. (U.S. 12(M) ¶ 62.) By an agreed order dated February 19, 1995, the USA paid in an escrow account the agreed amount of $32,202,455.91 for principal taxes for 1985-1992 on the Records Center and for principal taxes for 1985-the first installment of 1993 on the Chicago SSC. On March 1, 1995, the USA paid the principal taxes by wire transfer. (U.S. 12(M) ¶ 63-64.) Prior to, during, and after the litigation in *Hynes* and *County of Cook II*, the County's Assessor continued to assess the subject properties for tax years 1990-93 and assessments made for prior years. Taxes were extended as per Illinois law. For each of the tax yrs 1985-93, the County applied to the Circuit Court for entry of judgment and order of sale at tax sale, apart from 1991 scavenger tax sale, the orders were granted, no bids were submitted, and the property was marked as forfeited to the State of Illinois for each year. (U.S. 12(M) ¶ 66.) The USA has never appeared in any of the state tax judgment and sale proceedings, has not

submitted to be a party, and has not consented to or acknowledged the state court's jurisdiction. (U.S. 12(M) ¶ 67.)

II. Summary Judgment Standards

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Cox v. Acme Health Serv., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552-53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion;

"there must be evidence on which the jury could reasonably find for the [non-movant.]" *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

On cross-motions for summary judgment, each movant must individually satisfy the requirements of Rule 56. *Proviso Association of Retarded Citizens v. Village of Westchester*, 914 F. Supp. 1555, 1560 (N.D. Ill. 1996); *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Ind.) Pension Fund v. Kelly*, 1996 WL 507258, *3 (N.D. Ill. 1996). Thus, the traditional standards for summary judgment still apply even though both parties have moved for summary judgment. *Blum v. Fisher and Fisher, Attorneys at Law*, 961 F. Supp. 1218, 1222 (N.D. Ill. 1997). The Court thus considers the merits of each cross-motion separately and draws all reasonable inferences and resolves all factual uncertainties against the party whose motion is under consideration. *Chicago Truck Drivers*, 1996 WL 507258 at *3. This "Janus-like perspective . . . sometimes forces the denial of both motions," but only where there are material facts in dispute. *Buttitta v. City of Chicago*, 803 F.Supp. 213, 217 (N.D. Ill. 1992), *aff'd*, 9 F.3d 1198 (7th Cir. 1993).

III. County's motion: Tax Injunction Act

The County's arguments regarding the Tax Injunction Act are the obvious place to start because they go to this court's jurisdiction over the present case. The Tax injunction Act states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. However, § 1341 is not given its literal meaning when applied to the United

States or its instrumentalities, for it has long been the law that " § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966). *See also Arkansas v. Farm Credit Services of Central Arkansas*, ___ U.S. ___, ___, 117 S.Ct. 1776, 1780, 138 L.Ed.2d 34 (1997) (discussing "the now settled rule that the Tax Injunction Act is not a constraint on federal judicial power when the United States sues to protect itself and its instrumentalities from state taxation").

The County does not dispute this exception to § 1341, but it does dispute the application of it in this case. The County argues that the United States has no viable claim for immunity because *Hynes* settled the issue and that the lack of a viable claim for immunity means that the § 1341 exception does not apply. The County cannot cite to any authority for this argument, because the only case supporting their claim has been overruled. *See United States v. Lewis County*, 1995 WL 324734 (W.D.Wash. 1995), *rev'd*, 1996 WL 468 651 (9th Cir. 1996). More to the point, the County's argument makes little sense. The County correctly notes that § 1341 is jurisdictional. *California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S.Ct. 2498, 2507, 73 L.Ed.2d 93 (1982); *Fromm v. Rosewell*, 771 F.2d 1089, 1092 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986). However, in arguing that this court should not have jurisdiction because the USA's claim of immunity is untenable, the County "conflates a jurisdictional and a substantive determination." *See United States v. State of Michigan*, 851 F.2d 803, 804 (6th Cir. 1988) (holding that determination of whether

federal credit union was federal instrumentality subject to tax immunity was substantive and should be decided after the court took jurisdiction, not as part of threshold determination of jurisdiction under instrumentality exception to § 1341). The County's argument would require this court to determine whether the USA has immunity from the County's tax sales, interest, and penalties before it could assume jurisdiction in a case whose purpose is to determine whether the USA has such immunity.[1] This court will not use § 1341 in that manner.

IV. County's motion: Res judicata and the USA's complaint

The Court next turns to the County's arguments regarding res judicata, for, if the County is correct that the USA's claims are barred by res judicata, then all arguments regarding the merits of the USA's claims would be moot. Res judicata is a judicial doctrine

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[1] The sole exception to the principle that the court should look to the substance of a claim after taking jurisdiction, not before, is the substantiality rule. See *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed.2d 939 (1946) ("The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."); *Ricketts v. Midwest National Bank*, 874 F.2d 1177, 1181-82 (7th Cir. 1989). As the Seventh Circuit has stated, "before a case is to be dismissed on [insubstantiality] grounds . . . a claim must be 'wholly,' 'obviously,' or 'plainly' insubstantial or frivolous; it must be 'absolutely devoid of merit' or 'no longer open to discussion.'" *Ricketts*, 874 F.2d at 1182. The USA's claims do not meet this threshold requirement, and, instead, will require detailed analysis as to whether they are or are not res judicata, which is the County's justification for arguing that they are groundless.

designed to ensure the finality of judicial decisions. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986), *National Organization for Women, Inc. v. Scheidler*, 897 F.Supp. 1047, 1056 (N.D. Ill. 1995). It is a "rule of fundamental and substantial justice," *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917); *Car Carriers*, 789 F.2d at 593, whose enforcement is essential to the maintenance of social order, "for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if . . . conclusiveness did not attend the judgments of such tribunals." *Alexander v. Chicago Park District*, 773 F.2d 850, 853 (7th Cir.1985) (quoting *Nevada v. United States*, 463 U.S. 110, 129, 103 S.Ct. 2906, 2917-18, 77 L.Ed.2d 509 (1983)), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986).

Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. *Alexander*, 773 F.2d at 853; *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). *See* Jack Friedenthal, Mary Kay Kane, Arthur Miller, *Civil Procedure* 610 (1993).

Res judicata promotes accuracy (leaving in place properly decided cases), efficiency ("it is in the interest of the state that there be an end to litigation"), and fairness ("no person should be twice vexed by the same claim"). Friedenthal, et al., *Civil Procedure* 617 (1993), see Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 Cornell L.Rev. 905, 910 (1992).

There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Car Carriers*, 789 F.2d at 595 n.9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar.

Here, the first and third requirements are met. In the *Hynes* action,[2] the parties were substantially the same as in this action, consisting of the USA, the County, and relevant County tax officials. Additionally, no one disputes that *Hynes* was a final judgment. Thus, the key issue is whether *Hynes* and this action share an identity of the causes of action. The Court of Appeals in this circuit employs the "same transaction" test to define a "cause of action." *Car Carriers*, 789 F.2d at 593; *Alexander*, 773 F.2d at 854; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1241 (7th Cir. 1983). Under the same transaction test, a "cause of action" consists of a " 'single core of operative facts' which would give rise

[2] The County has attempted to claim res judicata based on *County of Cook II*. This claim has no merit. *County of Cook II* was voluntarily dismissed under Fed.R.Civ.P. 41(a)(1)(i). Because it was not dismissed with prejudice, this action operated as "one free dismissal," without any prejudice toward the USA's ability to refile another action, even one identical to *County of Cook II*. *See Cooter & Gell v. Hartmark Corp.*, 496 U.S. 384, 397, 110 S.Ct. 1447, 2457, 110 L.Ed.2d 359 (1990), *superseded on other grounds by amendment to Fed.R.Civ.P. 11*. Contrary to the County's arguments, Rule 41(a)'s limits are solely to prevent plaintiffs from taking multiple nonsuits. *Id.* Thus, the fact that the USA filed and voluntarily dismissed *County of Cook II* is irrelevant; the only relevant final judgment is *Hynes*.

to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander*, 773 F.2d at 854). The "same transaction" test is fact-oriented, and provides that once a transaction has caused injury, all claims arising from that transaction must be brought in the same suit or be lost. *Car Carriers*, 789 F.2d at 593.

The USA claims that its current action does not arise from the same transaction as did *Hynes*. In the alternative, it argues that res judicata, which generally applies to litigants, is trumped by a claim of sovereign immunity, such that the United States cannot be prevented from bringing a previously unmade claim of sovereign immunity, even one from the "same transaction" as in a prior final judgment, because that would amount to impermissible waiver of sovereign immunity by government attorneys. The court will go through each level of this analysis, first determining whether any or all of the claims are from the same transaction as in *Hynes*. Next, the court will determine whether any claim of sovereign immunity from the same transaction as in *Hynes* is different from the claimed sovereign immunity in *Hynes*, (i.e., not decided in *Hynes*). Finally, if there are any claims of sovereign immunity from the same transaction as in *Hynes* which were not decided in *Hynes*, the court will determine whether res judicata should be applied to those claims. At the end of this analysis, any claims which arose from the same transaction as in *Hynes* which either were actually litigated in *Hynes* or which were not litigated but do not merit a waiver of res judicata on sovereign immunity grounds will be ruled res judicata and will not be considered on the merits.

First, the court considers whether the claims in this action arise from the same transaction as did the claims in *Hynes*. The USA has put forth four claims in this action: (1) seeking a declaratory judgment that the United States has not consented to foreclosure tax sales and, thus, that the foreclosure sales and tax scavenger sales of the subject properties are illegal and void under the doctrine of sovereign immunity and the Supremacy Clause of the United States Constitution; (2) seeking a TRO and preliminary and permanent injunctions prohibiting the County and its officials from conducting future tax foreclosure sales or obtaining tax deeds as a result of past tax scavenger sales; (3) seeking a declaratory judgment that § 602a(d) is not consent to interest or penalties on taxes and that absent federal statutory consent to be liable for interest and penalties, the United States is not liable for interest or penalties to the County; (4) seeking declaratory judgment that the County incorrectly computed the interest and penalties due if the court finds that the United States is liable for interest and penalties.

The court finds that the first two claims, both of which deal with tax sales and with the obtaining of tax deeds against the subject properties, do not arise from the "same transaction" has did the claims in *Hynes*. At the time of *Hynes*, the only tax sale that had actually resulted in a purchase of the tax liens on the subject properties was effectively quashed by the District Court in *County of Cook I* when the individual purchasers defaulted due to failure to appear. (U.S. 12(M) ¶29.) After that, *County of Cook I* held that the USA was not liable to pay taxes under the then-current Illinois laws. 725 F.2d 1128 (7th Cir. 1984). From 1979 through the purchase of the tax liens by Cook County in 1991, there

were no tax bids for the tax liens of the subject properties at any of the County's tax sales. (U.S. 12(M) ¶¶ 35, 41-42, 55).[3] Thus, at the time that *Hynes* was filed, there was no imminent risk of a tax purchaser threatening the USA's property interest in the subject properties. The fact that the USA knew of the tax sale before the final judgment in *Hynes* was handed down is irrelevant; "plaintiffs need not amend filings to include issues that arise after the original suit is lodged." *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993). Similarly, the fourth claim, which challenges the imposition of additional interest and penalties after the tax sale is dependent upon the event of the tax sale occurring, so that claim also fails to arise from the "same transaction" as did *Hynes*.

The claim regarding pre-sale interest and penalties does arise from the same transaction as did the claims in *Hynes*. In the complaint for *Hynes*, the USA requested a declaratory judgment and preliminary and permanent injunctions against the imposition, assessment, and collection of *ad valorem* taxes against the subject properties on grounds that they unconstitutional discriminated against the USA. Undeniably, under Illinois law an interest penalty automatically accrues on delinquent taxes, *see* 35 ILCS 200/21-15 and 35 ILCS 200/21-25, and the County's officials specifically noted in their statement of undisputed facts in

[3] In many ways, the ruling in *County of Cook* I made it unlikely that a purchaser would bid on the subject properties, because, absent a ruling that a change in the laws rendered the subject properties taxable, the tax liens against the properties were useless. Thus, the ruling in *Hynes* was the key change which made the purchase of the tax liens against the properties a potentially profitable endeavor.

support of summary judgment in *Hynes* that interest was and had been accruing on the subject properties. (U.S. Exh. 11.) Additionally, the USA did state in their in *Hynes* complaint that penalties and interest had been accruing from 1985 forward. (U.S. Exh. 10, ¶ 19) Thus, the facts from which *Hynes* arose included pre-sale interest penalties, as does this claim. The USA attempts to argue that the fact that *Hynes* and this claim put forth different legal theories means that they arise from different transactions, but that is contrary to the fact-based same transaction test. *Car Carriers*, 789 F.2d at 593.

After the first level of the res judicata test, the only claim which could be res judicata is the claim regarding pre-sale interest and penalties. The second level[4] of the analysis seeks to determine whether *Hynes* actually decided this claim or if the claim, though arising from the same transaction, was not decided by *Hynes*. As the County itself has stated, tax immunity and sovereign immunity are separate doctrines with separate lineages. (See County's 12(M)(2) Memorandum of Law, p. 1, citing Hynes, 20 F.3d at 1444, n. 1 (Cudahy, J., concurring).) *Hynes* dealt with tax immunity, while this case deals with sovereign immunity. 20 F.3d at 1440. Additionally, nowhere in *Hynes* does the majority deal with the question of whether the consent to state and local taxation in § 602a(d) extends to interests and penalties. Thus, the claim in this case regarding pre-

[4] The reason why the second level is necessary is because even the USA does not claim that it could raise the *exact* same claim, arising from the same transaction and presenting the same legal theory, and escape res judicata. Thus, if the USA can ever trump res judicata with claims of sovereign immunity, it can only do so when the claims are new, though arising from the same transaction as a prior final judgment.

sale interest and penalties, though arising from the same transaction as did the claims in *Hynes*, is a different claim from the ones in *Hynes*.

Because the claim regarding pre-sale interest and penalties remains after the second level of analysis, this court must consider the third level of analysis: whether the USA has the right to raise a sovereign immunity claim regarding pre-sale interest and penalties despite the doctrine of res judicata. As a general rule, res judicata applies against the government when it litigates "with the same party an issue arising in both cases from virtually identical facts." *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 172, 104 S.Ct. 575, 580, 78 L.Ed.2d 388 (1984); *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984) (accepting mutual offensive collateral estoppel against the United States but rejecting nonmutual offensive collateral estoppel). The United States, however, argues that this case falls into a special exception to that rule: that res judicata may be trumped by the doctrine of sovereign immunity. *See Durfee v. Duke*, 375 U.S. 106, 114, 84 S.Ct. 242, 246, 11 L.Ed.2d 186 (1963). The seminal case for this proposition is *United States v. United States Fidelity & Guaranty* ("*USF&G*"), where the court refused to find that the government's failure in the prior cause of action to raise sovereign immunity or to appeal the final judgment led to either waiver of sovereign immunity or res judicata. 309 U.S. 506, 513-14, 60 S.Ct. 653, 657, 84 L.Ed.2d 894 (1940). This conclusion flows from two interrelated proposition: that an officer of the government cannot, by action or inaction, waive sovereign immunity and that a judgment in the absence of waiver of sovereign immunity is void. *Id.* The County's attempt to limit *USF&G* to a narrow

holding related to counterclaims fails, for *USF&G* clearly states that the failure to object on sovereign immunity grounds in a prior case neither waives sovereign immunity nor precludes a later claim of sovereign immunity in a subsequent action. *See Sterling v. United States*, 85 F.3d 1225, 1231 (7th Cir. 1996) ("[T]he Supreme Court has held that a judgment is afforded no res judicata effect if the claim should have been dismissed on the ground of sovereign immunity.") (citing *USF&G*) (Flaum, J., concurring); *Department of the Army v. Federal Labor Relations Authority*, 56 F.3d 273, 27 (1995) (citing *USF&G* for the proposition that the federal government cannot waive sovereign immunity by failing to raise it in a prior action); *Hooper v. United States*, 326 F.2d 982, 984 (Ct.Cl.) ("It appears that where the public policy requiring the application of res judicata and collateral estoppel is outweighed by overriding considerations like . . . sovereign immunity, the Court has not adhered to the finality that would otherwise be given to the prior decree.") (citing *USF&G*), *cert. denied*, 377 U.S. 977, 84 S.Ct. 1882, 12 L.Ed.2d 746 (1964); *Danning v. United States*, 259 F.2d 305, 311 (9th Cir. 1958) (stating the "settled rule that the government cannot lose its immunity by any act or omission or its agents, and that consent to be sued cannot be implied from the action or inaction of its officers"; citing *USF&G* for proposition that "failure to appeal an adverse judgment does not work an estoppel against the government), *cert. denied*, 359 U.S. 911, 79 S.Ct. 587, 3 L.Ed.2d 574 (1959). Thus, while the Supreme Court does not favor the creation of new public policy exceptions to res judicata, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), this particular exception to res judicata has a long, unbroken history.

One aspect of this case causes the court to pause before holding that res judicata does not bar the USA's claim regarding pre-sale interest and penalties. None of the cases in this line deal with the situation where the USA raised one immunity claim but failed to raise a different, though related, immunity claim. As much as that strikes the court as the USA attempting to take two bites at one apple,[5] the logic of *USF&G* and subsequent cases dictates that, where a sovereign immunity claim was left unlitigated in a prior action, that prior action does not bar a subsequent claim of sovereign immunity. Even if the "same transaction" principle required that the issue of sovereign immunity as to interest and penalties had been decided previously (by default), under the teaching of USF & G, that decision would not be binding in this case.

V. USA's motion: Merits of the complaint

"The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires." *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927). Waivers of federal sovereign

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[5] The USA attempts to rely on an asserted policy against "overlitigating," but this is not only blatantly contrary to the whole concept of res judicata, but also is undermined by the fact that both cases that the USA cites as authority for this proposition are expressly grounded in the special policy concerns surrounding bankruptcy cases. *See Brown v. Felsen*, 442 U.S. 127, 133, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), *superseded by statute as stated in In re Pine Creek II Apartments, Ltd.*, 182 B.R. 36 (Bankr.W.D. Ark.1995); *Levinson v. United States*, 969 F.2d 260 (7th Cir.), *cert. denied*, 506 U.S. 989, 113 S.Ct. 505, 121 L.Ed.2d 441 (1992).

immunity or taxation immunity must be "'unequivocally expressed' in the statutory text." *United States v. Idaho, ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 6, 113 S.Ct. 1893, 1896, 123 L.Ed.2d 563 (1993) (sovereign immunity) (citation omitted); *Mayo v. United States*, 319 U.S. 441, 448, 63 S.Ct. 1137, 1141, 87 L.Ed. 1504 (1943) (taxation immunity). Where Congress has provided a statutory waiver of sovereign immunity, a court interpreting such a waiver should construe it "strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 26 (1951), *superseded on other grounds by statute as stated in Dalton v. Southwest Marine, Inc.*, 120 F.3d 1249 (Fed.Cir.1997). *See also United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (stating that waivers of sovereign immunity to be strictly construed in favor of the sovereign "and not enlarged beyond what the language of the statute requires"), *superseded by statute on other grounds as stated in Hanna Coal, Co. v. I.R.S.*, 1994 WL 762188 (W.D. Va. 1994); id. at 37, 112 S.Ct. at 1016 ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."). Congress has granted a waiver of taxation immunity in § 602a. The court now considers whether § 602a also waives sovereign immunity from tax sales of its property and from interest and penalties.

A. Tax sales

A longstanding rule of sovereign immunity is that United States property is not subject to sale by a state. *See City of New Brunswick v. United States*, 276 U.S. 547, 556, 48 S.Ct. 371, 373, 72 L.Ed. 693 (1928) (stating that United States Corporation's mortgage interest "being held by the Corporation for the benefit of the United States, is paramount to the taxing power of the State and cannot be subjected by the City to sale for taxes." *See also United States v. Alabama*, 313 U.S. 274, 61 S.Ct. 1011, 85 L.Ed. 1327 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States. . . . [I]n the absence of its consent to the prosecution of such proceedings [for the sale of property in which the USA has an interest], the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void."); *State of Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (holding that where United States was an indispensable party to condemnation of a property to which the United States held an interest, sovereign immunity barred the condemnation "unless authorized by some act of Congress"), *superseded on other grounds by statute as stated in Brizendine v. Continental Cas. Co.*, 773 F. Supp. 313 (N.D. Ala. 1991); *United States v. Bluhm*, 414 F.2d 1240, 1243 (7th Cir.1969) (holding that where the United States holds a senior lien in a property, that lien "cannot be extinguished in any proceeding without its consent to be sued"), *cert. denied*, 397 U.S. 910, 90 S.Ct. 909, 25 L.Ed.2d 91 (1970). *Cf. Neukirchen v. Wood County Head Start, Inc.*, 53 F.3d 809, 812 (7th Cir. 1995) ("It is . . . axiomatic that the doctrine of sovereign immunity prevents a judg-

ment creditor from attaching federal property, absent consent by the United States.").

Despite the County's attempts to squeeze the principle in *New Brunswick* to fit a narrower holding, this court must apply it broadly, as have other courts dealing with similar questions. *See Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir.) ("The principle enunciated in the *New Brunswick* decision has found general application in other cases involving similar disputes over the state's authority to enforce its lien against a federal interest in property.") (citing cases), *cert. denied*, 444 U.S. 964, 100 S.Ct. 450, 62 L.Ed.2d 376 (1979). The fact that the USA's interest in the subject properties is one of equitable and, now, legal title, rather than a mortgage interest does not change this policy.[6]

Thus, for the County to have the authority to submit the subject properties to a tax sale, the County needs statutory authority to do so. The County points to the

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[6] The County argues that the distinction between tax and sovereign immunity means that the *New Brunswick* line of cases does not apply to it. However, the County has failed to show why the distinction means that the USA's property is subject to tax sales. The County cites a case, *United States v. May*, which allowed the state's tax lien to hold priority in rank over the USA's mortgage interest in a property. 264 F.2d 317, 321 (10th Cir. 1959). Not only does this case not serve to justify a breach of sovereign immunity regarding a tax sale, but the statute at issue, unlike § 602a, contains the phrase "according to its value as other real property is taxed," which is interpreted to mean that the tax machinery of the state is to be applied without interference. *See* discussion *infra*. Absent express congressional authorization of tax sales of the subject properties, the Circuit Court of Cook County and, indeed, any other court, has no jurisdiction to order such a tax sale.

"unconditional waiver of immunity" in § 602a(d). *Hynes*, 20 F.3d at 1441. But *Hynes* does not deal with the question of whether this waiver applies to the general prohibition against tax sales of USA property, for, when the *Hynes* court termed the waiver in § 602a(d) "unconditional," it was referring to the fact that the waiver of intergovernmental tax immunity was not conditioned upon nondiscrimination against the USA. *Id.* In fact, neither the County nor this court has found a single case which allowed a state to extinguish the USA's interest in property without express congressional authorization for such an action. Section 602a contains no language granting states the authority to sell the government's interest in § 602a properties. Thus, this court holds that sovereign immunity protects the USA from tax sales of the subject properties. *See United States v. County of Richland*, 500 F. Supp. 312, 315-16 (D.S.C. 1980) (holding that under similar statute which allowed certain USA property to be taxed but "does not allow the summary execution and sale of such property," there was no express waiver of sovereign immunity against sale of the USA's interest in property).[7] Because the tax sales are void under sovereign

[7] The County also argues that § 602a should be read to allow tax sales of the subject properties by negative implication because the similarly worded Financial Institutions Reform, Recovery and Enforcement Act of 1989 includes a specific section protecting FDIC property from "levy, attachment, garnishment, foreclosure, or sale without the consent of the Corporation." 12 U.S.C. § 1824(b)(2). Beyond the fact that the court is unwilling to reject a well-established theory of sovereign immunity simply because Congress chose in one statute to add specific protection for one form of government property, such implication is inappropriate for other reasons. First, this section is a supplement to the *New Brunswick* line of cases, not a replacement of that line of cases. *See Simon v. Cebrick*, 53 F.3d 17, 20 (3d Cir. 1995) (citing the *New*

immunity, the court also holds that all interest and penalties attributable to the tax sales are also void.

B. Penalty/interest

As a general rule, the United States has sovereign immunity from being assessed either interest or penalties. *See United States Dept. of Energy v. Ohio*, 503 U.S. 607, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992) (rejecting claim that statute had waived USA's sovereign immunity from liability for civil penalties), *superseded on other grounds by statute as stated in United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993); *Library of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 2962, 92 L.Ed.2d 250 (1986) ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest

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Brunswick line of cases as a general protection for USA property and § 1825(b)(2) for specific protection of FDIC property). Second, § 1825(b)(2) not only protects FDIC property, but allows the FDIC to waive that protection; thus, Congress reaffirmed the existence of sovereign immunity for FDIC at the same time that it granted the FDIC the unusual ability to waive sovereign immunity. Third, FIRREA, unlike § 602a(d) contains a phrase which has been interpreted "as communicating Congress intent not to interfere with the local real estate tax machinery." *Simon*, 53 F.3d at 21 (discussing phrase subjecting property to state and local taxation "to the same extent according to its value as other real property is taxed. . . ."; citing *Reconstruction Finance Corp. v. Beaver County* for statutory interpretation of that phrase). Thus, Congress, being aware of the previous interpretations of that phrase, bolstered sovereign immunity in FIRREA, where that phrase was used, but did not bolster sovereign immunity in § 602a, where that phrase was not used. In short, even if this court was willing to breach sovereign immunity by implication, the lack of statutory protection in § 602a from tax sales of USA property does not clearly and unambiguously act to waive sovereign immunity.

award."), *superseded on other grounds by statute as stated in Fernando v. Hotel Nikko Saipan, Inc.*, 1992 WL 350312 (D.N. Mariana Islands 1992); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 658, 67 S.Ct. 601, 603, 91 L.Ed. 577 (1947) ("the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims").

The issue in this case comes down to whether the waiver of tax immunity in § 602a(d) also waives the sovereign's immunity from penalties and interest. Under *Library of Congress*, which requires separate, express congressional consent to the award of interest, it would appear at first glance that § 602a(d) cannot possibly be sufficient. But the County points to a line of cases, culminating in a Fourth Circuit opinion stating that the court should look to state law to determine whether "taxes," which Congress has consented to pay, includes penalty and interest. *See Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209, 66 S.Ct. 992, 995-96, 90 L.Ed. 1172 (1946) ("The fact that Congress subjected [the relevant] properties 'to the same extent according to its value as other real property is taxed' indicated an intent to integrate Congressional permission to tax with established local tax assessment and collection machinery."); *United States v. May*, 264 F.2d 317, 321 (10th Cir. 1959) (holding that tax lien received priority under state law over USA's mortgage interest in property where statute consented to "State, . . . county, . . . or local taxation to the same extent according to its value as other real property is taxed."); *Federal Reserve Bank of Richmond v. City of Richmond*, 957 F.2d 134, 136-37 (4th Cir. 1992).

However, the *Beaver County* line of cases does not state that a general waiver of tax immunity is sufficient to execute a specific waiver of sovereign immunity from penalties or interest. This is particularly true with a statute, like § 602a, which does not use the statutory language, "to the same extent according to its value as other real property is taxed," which was key to the Beaver County holding. *Beaver County*, 328 U.S. at 209, 66 S.Ct. 995-96; *Simon v. Cebrick*, 53 F.3d 17, 21 (3d Cir. 1995). In the absence of a clear manifestation of congressional intent to waive sovereign immunity from interest and penalties or either Supreme Court or Seventh Circuit precedents holding that a *general* waiver of tax immunity is sufficient to override the USA's sovereign immunity from interest and penalties, this court will not find that § 602a constitutes consent by the USA to imposition of penalties or interest against the subject properties.

VI. USA's motion: Sovereign immunity against the County's counterclaims

The County may not raise counterclaims against the United States. *USF&G*, 309 U.S. at 512. *See also Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (requiring congressional authorization to file a counterclaim against a sovereign Indian tribe; finding that filing of action for injunctive relief did not waive sovereign immunity from counterclaim for unpaid taxes). The County's argument that its claim is merely for recoupment is incorrect. While a counterclaim for recoupment to reduce or defeat the USA's claim would be permissible, "no affirmative judgment over and above the amount of its claim can be rendered against the United States." *In re Greenstreet*,

209 F.2d 660, 663 (7th Cir. 1954) (citing *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940)). Because the USA filed a suit for declaratory and injunctive relief, any judgment in favor of the County on its counterclaims would be an "affirmative judgment," for the USA has requested no damages against which the counterclaim damages could be balanced. The County attempts to sidestep this jurisdictional bar, citing *State of Alabama v. United States*, 282 U.S. 502, 51 S.Ct. 225, 75 L.Ed. 492 (1931) for the proposition that a claim against the federal government for state taxes is not "founded upon the Constitution" or United States laws but, instead, is part of the original powers of the state. A more careful reading, however, finds that the Court was very careful not to say that the state actually had a right to raise such a claim. *See id.* at 507, 51 S.Ct. at 226 ("If the claim is valid, *which we are far from implying*, it is under the State's original powers as such. . . . "). *Potawatomi Tribe* controls this point, and it firmly holds that the State has no such right to raise such a counterclaim. 498 U.S. at 510, 111 S.Ct. at 909.

VII. Conclusion

The USA's cross-motion for summary judgment is GRANTED and the County's cross-motion for summary judgment is DENIED. The USA's claims for declaratory and injunctive relief against tax sales, interest, and penalties are GRANTED on grounds of sovereign

immunity and the County's counterclaims are DENIED on grounds of sovereign immunity. The case is CLOSED.

Enter:

/s/ DAVID H. COAR
DAVID H. COAR
United States
District Judge

Dated: September 30, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 94 C 7068

UNITED STATES OF AMERICA

v.

COUNTY OF COOK, ILLINOIS, ET AL

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, United States of America's cross-motion for summary judgment is Granted. The defendant County of Cook, Illinois cross motion for summary judgment is denied. The United States of America's claims for declaratory and injunctive relief aganst tax sales, interest, and

penalties are granted. The County of Cook, Illinois counterclaims are denied. This case is closed.

Michael W. Dobbins, Clerk of Court

Date: 9/30/97 /s/ PATRICIA MCQURTER-FIGGS
PATRICIA MCQURTER-FIGGS,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 7068
Hon. David H. Coar

UNITED STATES OF AMERICA, PLAINTIFF

v.

COUNTY OF COOK, ILLINOIS, ET AL., DEFENDANTS

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
COUNTERPLAINTIFFS

v.

UNITED STATES OF AMERICA, COUNTERDEFENDANT

[Filed: Nov 12, 1997]

ORDER AMENDING JUDGMENT ENTERED ON SEPTEMBER 30, 1997

Having considered the MOTION OF PLAINTIFF AND COUNTERDEFENDANT UNITED STATES OF AMERICA TO ALTER OR AMEND JUDGMENT, the supporting memorandum of points and authorities, the DEFENDANTS-COUNTERPLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT, AND FOR TRANSFER PURSUANT TO 28 U.S.C. § 1631, and the entire record of this proceeding, it is hereby

ORDERED that, the Court having found pursuant to Fed. R. Civ. P. 54(b) there being no just reason for delay, the JUDGMENT IN A CIVIL CASE entered on September 30, 1997 be, and hereby is, AMENDED to now provide for final judgment as to all counts of the complaint and all but Counts III and V of the counterclaim as follows:

> IT IS ORDERED AND ADJUDGED that the cross-motion for summary judgment of the United States of America be, and hereby is, GRANTED; and
>
> IT IS ORDERED AND ADJUDGED that the cross-motion for summary judgment of defendants and counterplaintiffs be, and hereby is, DENIED; and
>
> IT IS ORDERED AND ADJUDGED that the motion for transfer pursuant to 28 U.S.C. § 1631 of defendants and counterplaintiffs be, and hereby is, GRANTED; and
>
> IT IS ORDERED AND ADJUDGED that all annual tax sales and subsequent forfeitures of the Harold Washington Social Security Center (formerly known as the Social Security Great Lakes Program Center) ("the SSA Building")[1] and the Federal Archives and Records Center ("the Records Center")[2]

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[1] The SSA Building is located at 600 West Madison Street, Chicago, Illinois. For purposes of Illinois property taxation, the SSA Building was listed on the tax records of Cook County as being located in the Township of West Chicago, Volume 590, and identified for the tax years 1977-1978 by the permanent real estate index numbers of 17-09-340-001 through -002 and 17-09-340-010 through -025, and for the tax years 1979-1993 by the permanent real estate index number 17-09-340-026-8002.

[2] The Records Center is located at 7358 South Pulaski Road, Chicago, Illinois. For purposes of Illinois property taxation, the

and the tax scavenger sales of those buildings to Cook County are null and void and of no effect and do not affect or impair in any way the ownership and title of the United States of America in the SSA Building and the Records Center; and

IT IS ORDERED AND ADJUDGED that the United States is immune from the imposition of penalties or charges designed to penalize it for failure to make prompt payment of taxes, and it has not waived this immunity with respect to penalties or charges designed to penalize for failure to make prompt payment of taxes on the SSA Building and the Records Center, and no penalties or penalty-type charges are due with respect to the SSA Building and the Records Center; and

IT IS ORDERED AND ADJUDGED that the United States is immune from the imposition of interest and that it has not waived this immunity with respect to interest on taxes on the SSA Building and the Records Center, and no interest charges are due with respect to the SSA Building and the Records Center; and

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their officers, employees, agents, servants, attorneys, and successors in office and all persons acting in concert with the aforementioned

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Records Center, was listed on the tax records of Cook County as being located in the Township of Lake, Volume 406, and identified for the tax years 1977-1979 by the permanent real estate index number 19-27-100-018, for the tax year 1980 by the permanent real estate index number 19-27-100-031-8002, and for the years 1981-1992 by the permanent real estate index number 19-27-100-033-8002.

who shall receive notice of this Order are enjoined from attempting to carry out any further tax sales or tax scavenger sales, or forfeitures of the SSA Building or the Records Center or to give effect to tax sales or tax scavenger sales, or forfeitures of those buildings that have already taken place; and

IT IS FURTHER ORDERED AND ADJUDGED that the escrow established under the agreed order of February 16, 1995 shall be terminated without further order of this court upon the entry of final judgment in this cause, after exhaustion of all avenues of further appellate review, including the expiration of time for seeking a writ of certiorari, or if a writ of certiorari is sought, the expiration of the time for seeking rehearing from the denial of a petition for a writ of certiorari or an adverse decision by the United States Supreme Court or the denial of any timely petition for rehearing filed with the United States Supreme Court. All of the funds in escrow shall be distributed to the County Collector of Cook County, Illinois, at the direction of the State's Attorney of Cook County, Illinois, upon such entry of final judgment as provided in this order; and it is further

ORDERED that, pursuant to 28 U.S.C. § 1631, Counts III and V of counterplaintiffs' counterclaim be, and hereby are, TRANSFERRED to the Court of Federal Claims; and it is further

ORDERED that the Clerk of the Court shall mail copies of this Order Amending Judgment Entered on September 30, 1997 to all persons listed below

DATED this 14th day of November, 1997.

/s/ DAVID H. COAR
DAVID H. COAR
United States District Judge

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 94 C 7068

UNITED STATES OF AMERICA, PLAINTIFF

v.

COUNTY OF COOK, ILLINOIS, ET AL., DEFENDANTS

PEOPLE OF THE STATE OF ILLINOIS EX REL. EDWARD J. ROSEWELLAND THE COUNTY OF COOK, ILLINOIS, EDWARD J. ROSEWELL, COOK COUNTY TREASURER AND EX OFFICIO COUNTY COLLECTOR, DAVID D. ORR, COUNTY CLERK OF COOK COUNTY, AND THE COUNTY OF COOK, ILLINOIS, COUNTERPLAINTIFFS

v.

UNITED STATES OF AMERICA, COUNTERDEFENDANT

[Filed: Feb 13, 1993]

STIPULATION OF FACTS

Now come the parties in this action and stipulate to the following facts, provided that this shall not

constitute an admission by either party of the relevance of any fact so stipulated:

Parties

1. Plaintiff-counterdefendant United States of America is a corporate sovereign and body politic which brought this action at the request of the General Services Administration ("GSA"). The GSA is the agency of the United States responsible, *inter alia,* for the acquisition, construction, maintenance, and management of most federal office buildings, courthouses, and other civilian federal buildings.

2. Defendant-counterplaintiff County of Cook, Illinois, is a political subdivision of the State of Illinois and a home rule unit under the Illinois Constitution of 1970.

3. Defendant-counterplaintiff Edward J. Rosewell is the duly elected and acting County Treasurer and Ex Officio County Collector of Cook County, Illinois, and has the duty pursuant to the Illinois Property Tax Code, formerly the Illinois Revenue Act of 1939, as amended, of collecting in the name of the State general real estate taxes levied and extended on behalf of various taxing bodies within Cook County.

4. Defendant-counterplaintiff David D. Orr is the duly elected and acting Clerk of Cook County, Illinois, and has the duty pursuant to the Illinois Property Tax Code, formerly the Illinois Revenue Act of 1939, as amended, of estimating the amounts due upon taxable property sold or deemed forfeited to the State of Illinois for nonpayment of taxes, and to order the

Collector to receive such amounts paid by the persons liable therefor.

5. Defendant-counterplaintiff Thomas C. Hynes is the duly elected and acting Assessor of Cook County, Illinois, and has the duty pursuant to the Illinois Property Tax Code, formerly the Illinois Revenue Act of 1939, of assessing real estate within Cook County for purposes of taxation.

6. Counterplaintiff State of Illinois is a corporate sovereign and body politic. The property taxes on the subject properties are imposed in part pursuant to the statutes Illinois.

The Subject Properties.

7. This action concerns two federal buildings in Chicago, Illinois, which were constructed on federally owned land: the Harold Washington Social Security Center, formerly the Social Security Great Lakes Program Center (the "Chicago SSC"), and the National Archives and Records Administration, formerly the Federal Archives and Records Center (the "Records Center") (collectively, "the subject properties").

8. During the period 1977 through 1993, the United States, through the GSA, was in the process of purchasing and acquiring title to each building under the authority of the Public Buildings Act Amendments of 1972, 40 U.S.C. § 602a ("§ 602a"). Subsequently, the United States has purchased and acquired title to the buildings pursuant to § 602a.

9. The Chicago SSC is located at 600 West Madison Street, Chicago, Cook County, Illinois. For purposes of

Illinois property taxation, this property was identified on the tax records of Cook County for the following tax years by the following permanent real estate index numbers:

Tax Year(s)	Permanent Index Number(s)
1977-1978	17-09-340-001 through -002 17-09-340-010 through -025
1979-1993	17-09-340-026-8002,

located in the Township of West Chicago, Volume 590.

10. The Chicago SSC is one of three Social Security Administration Payment Centers for which the GSA, pursuant to § 602a, entered into a Public Buildings Purchase Contract and Trust Indenture dated March 21, 1973 (the "purchase contract"), with First National City Bank (now known as "Citibank, N.A.," and here after referred to as "Citibank"). The other two centers are located in Richmond, California (San Francisco Bay Area), and Philadelphia, Pennsylvania.

11. Pursuant to the purchase contract, construction of the Chicago SSC and the other payment centers was financed with the proceeds from debt securities known as "participation certificates" issued by the GSA. Under the terms of the purchase contract, the United States caused legal title to the Chicago SSC to be held by Citibank, as trustee, as security while installment payments were made to repay the participation certificates and complete the purchase. The contract also provided Citibank with a leasehold interest in the federally owned land underlying the Chicago SSC as additional security for the repayment of the participa-

tion certificates, and to allow construction of the building that site.

12. The participation certificates were to be repaid in installments over a thirty year period ending in 2003, with a unilateral prepayment option in the Government. The terms of the purchase contract provided that once the participation certificates had been paid, or prepaid at the Government's option, Citibank would be automatically defeased of all interests in the Chicago SSC and would lose its leasehold interest in the site. The contract also required the trustee to execute such written instruments as the United States might request to make clear upon the public records that the trustee's interest in the Chicago SSC was transferred and the lease to the site was terminated.

13. The Chicago SSC has been utilized and occupied solely by agencies of the United States for official federal government purposes at all times relevant to this action. Although the United States did not hold legal title to the Chicago SSC during the period of installment payments under the purchase contract, the United States was the equitable owner of the building during this period.

14. In February, 1993, the United States refinanced and prepaid the participation certificates through the Federal Financing Bank, a body corporate wholly owned by the United States. *See* 12 U.S.C. § 2283. As part of the refinancing and prepayment, Citibank, as trustee, conveyed legal title to the Chicago SSC to the Federal Financing Bank by quitclaim deed dated February 25, 1993, and the underlying ground lease was terminated. On June 28, 1994, the Federal Financing Bank conveyed legal title to the Chicago SSC to the

United States through a quitclaim deed of the same date, which was recorded in the office of the Cook County Recorder of Deeds on August 18, 1994.

15. The Records Center is located at 7358 South Pulaski Road, Chicago, Illinois. For purposes of Illinois property taxation, this property was identified on the tax records of Cook County for the following tax years by the following permanent real estate index numbers:

Tax Year(s)	Permanent Index Number(s)
1977-1978	19-27-100-018
1980	19-27-100-031-8002
1981-1992	19-27-100-033-8002,

located in the Township of Lake, Volume 406.

16. Pursuant to § 602a, the United States entered into three agreements (collectively, the "purchase contract"): a contract with the Pathman Construction Company ("Pathman") dated September 28, 1972, to finance, construct, and sell the Records Center; a trust agreement dated September 28, 1972, with the American National Bank and Trust Company of Chicago ("American National") and Pathman; and a contract with American National and Pathman dated November 7, 1973, to purchase the Records Center.

17. Under the terms of the purchase contract, Pathman agreed to build the Records Center, to finance its construction, and to sell it to the United States through installment payments, with legal title to the building being conveyed to American National, as trustee, to hold as security. The purchase contract provided for the installment payments to be made over

a 30-year period ending in 2003, with unilateral prepayment option in the Government. After full payment has been made the purchase contract provided that the trustee's interest would be extinguished and legal title to the building would vest automatically in the United States.

18. The United States also executed a ground lease in the underlying land to Pathman to facilitate the construction and as security for payment of the purchase price. This ground lease was subject to unilateral termination by the United States immediately upon full payment of the purchase contract. Pathman, in turn, assigned the lease to American National.

19. The Records Center has been utilized and occupied solely by agencies of the United States for official federal government purposes at all times relevant to this action. Although the United States did not hold legal title to the Records Center during the period of installment payments under the purchase contract, the United States was the equitable owner of the building during this period.20. In September, 1994, the installment purchase contracts for the Records Center were prepaid and terminated. Pathman executed a special warranty deed September 13, 1994, conveying any interest it had to the United States, and the trustee executed a quitclaim deed dated September 2, 1994. The prepayment was received by Pathman and the trustee on September 27, 1994, and the deeds were recorded in the office of the Cook County Recorder of Deeds on September 29, 1994.

State and Local Taxation of § 602a
Buildings Throughout the United States.

21. Congress expressly provided under § 602a:

> With respect to any interest in real property acquired under the provisions of this section, the same shall be subject to State and local taxes until title to the same shall pass to the Government of the United States.

40 U.S.C. § 602a(d).

22. In addition to the Chicago SSC, the Records Center, and two other buildings located in Carbondale and Mt. Vernon, Illinois, numerous other federal buildings have been constructed pursuant to contracts under § 602a, where such purchase contracts were in force during the period of 1977 through 1993, throughout the United States, Puerto Rico and the Virgin Islands. Through GSA, the United States paid $273,581,843 of state and local taxes on at least 56 § 602a buildings located in 32 states other than Illinois (in addition to taxes on two more buildings in Puerto Rico and the Virgin Islands) during this period. There were an additional 6 § 602a buildings in Texas and Ohio which were exempted from state and local taxes. All federal buildings constructed pursuant to § 602a have now been refinanced and title has passed to the United States.

23. Attached to this stipulation as Exhibit 1 and incorporated by reference herein is a chart which lists the § 602a buildings in the 32 other states on which state and local taxes were paid by the United States through GSA during the period of 1977 through 1993,

and which specifies the amounts of such taxes and the years for which they were paid for each building.

24. Although it has from time to time contested the amount of taxes imposed on particular § 602a buildings in other states, the United States has never contested the fundamental validity, under the United States Constitution or laws or the applicable state constitution or laws, of the state and local taxes imposed on any § 602a building in any state, except the subject fedeal buildings in Illinois. The United States has never brought any other lawsuit similar in nature to the prior litigation between the instant parties, in which the United States contested the fundamental validity of the state and local taxes imposed on the § 602a buildings, in any other state besides Illinois.

Taxation of the Subject § 602a Buildings in Illinois, and the Prior Litigation Between the Parties.

25. From 1977 to 1993, the Cook County Assessor assessed the Chicago SSC and the Records Center for taxation pursuant to the general Illinois *ad valorem* property tax law, the Revenue Act of 1939, as amended, recodified as the Property Tax Code, and pursuant to § 602a(d). The assessments for each of these years were based upon valuations of the subject buildings and did not include any valuations of the underlying land.

26. The Assessor also made assessments of the Social Security Center for tax years 1975 and 1976, and of the Records Center for tax years 1972 through 1976, for omitted property or "back taxes." However, the counterplaintiffs have now determined that they will no longer seek to collect or enforce such back taxes through either state or federal legal proceedings.

27. The United States did not pay any part of the taxes assessed and extended for any tax year to the subject properties, nor as to the other Illinois §602a properties, piror to calendar year 1994.

28. As a result of the United States' nonpayment of the property taxes originally assessed and extended against the Chicago SSC for the years 1975 through 1977, and the nonpayment of the property taxes originally assessed and extended against the Records Center for the years 1972 through 1977, the Cook County Collector in 1979 applied to the Circuit Court of Cook County for judgment and order of sale against both properties as directed by § 235a of the Illinois Revenue Act of 1939 (the "Scavenger Act"), Ill. Rev. Stat. 1991, ch. 120, ¶ 735a, resectioned as 35 ILCS 205/235a (1992), recodified as Property Tax Code §§ 21-145 and 21-260, 35 ILCS 200/21-145, 200/21-260 (1994). The Collector conducted a tax sale of the Chicago SSC on July 31, 1979, and a tax sale of the Records Center on October 12, 1979, pursuant to the judgments and orders of sale. Separate individual tax purchasers successfully bid at the tax sales for each property and were issued certificates of purchase pursuant to the Revenue Act.

29. In June 1980, the United States brought suit in the United States District Court for the Northern District of Illinois (hereinafter "this Court") for a judgment declaring the Chicago SSC and Records Center exempt from local *ad valorem* taxation and vacating the tax sales. *United States v. County of Cook*, Case No. 80 C 3274 (N.D. Ill.) ("*County of Cook I*"). A copy of the complaint is attached as Exhibit 2. The individual tax purchasers of the buildings were named defendants in this action along with the Cook County taxing officials.

The tax purchasers did not appear and defaults were entered against them. References to the "parties" to *County of Cook I* in this stipulation are solely to the plaintiff United States and the defendant Cook County officials.

30. The defendant Cook County officials did not file a counterclaim in *County of Cook I* seeking to collect the taxes, interest and penalties assessed against the subject properties through federal court proceedings. The defendant Cook County officials did pursue judgments and orders of tax sale through the Circuit Court of Cook County regarding the taxes, interest and penalties assessed and extended against the subject properties.

31. The parties to *County of Cook I* filed cross motions for summary judgment. Copies of the parties' respective memoranda in support of their motions are attached to this stipulation as Exhibits 3 and 3.

32. On December 27, 1982, this Court granted the United States' motion and denied Cook County's cross motion. The court declared the subject property exempt from *ad valorem* taxation for "so long as the parcels as being purchased by the federal government under installment contracts pursuant to statutory authority and the parcels are used exclusively for the public purposes of the federal government." *United States v. County of Cook*, Case No. 80 C 3274 (N.D. Ill. Dec. 27, 1982). Copies of the Memorandum Opinion and Judgment Order are attached to this stipulation as Exhibits 5 and 6.

33. The defendant Cook County officials appealed from this Court's judgment order, and the United

States Court of Appeals for the seventh Circuit subsequently affirmed the judgment of this Court. *United States v. County of Cook*, 725 F.2d 1128 (7th Cir. 1984. A copy of the Court of Appeals decision is attached as Exhibit 7.

34. Prior to, during, and after the litigation in *County of Cook I*, the Cook County Assessor continued to assess the subject properties for tax years 1979 through 1984, and the assessments made for 1977-1978 (and prior years) remained on the Cook County tax records. Taxes were extended upon these assessments by the other Cook County taxing officials as directed by the Illinois Revenue Act of 1939. When none of the taxes were paid, for each of tax years 1977-1984, the Cook County Collector, as directed by the Illinois Revenue Act, applied to the Circuit Court of Cook County for entry of a judgment and order of sale in relation to each year's taxes. Thereafter, the Collector offered the subject tax liens at the tax sale held for each year pursuant to the Revenue Act and pursuant to the judgments and orders of sale entered by the Circuit Court of Cook County.

35. No bids were submitted at the annual tax sales on the subject properties for any of tax years 1977-1984, and the subject buildings (but not the underlying federally owned land) were marked in the tax judgment and warrant records as "forfeited" to the Sate of Illinois as directed by the Illinois Revenue Act of 1939 for each of these years, except 1984, as to which they were marked as "exempt". The United States has never paid any part of the taxes shown on the tax judgment and warrant records for each of these tax years 1977-1984 to the date of this stipulation. Attached to this stipula-

tion as Exhibit 8 are estimates prepared by the Cook County Clerk in the statutory form prescribed by the Illinois Revenue Act of 1939 (now the Property Tax Code) setting forth the amount of taxes, interest and penalties sought by the County upon the subject properties pursuant to Illinois law as checked and audited by the Cook County Clerk on January 24, 1995. The full amount of taxes including interest and penalties then totaled $49,409,723.23, calculated in accordance with Illinois law, of which amount $30,402,412.48 was for interest and penalties.

36. Effective January 1, 1985, the Illinois General Assembly amended ¶ 500.9a, exempting:

> [a]ll property that is being purchased by a governmental body under an installment contract pursuant to statutory authority and used exclusively for the public purposes of the governmental body, *except such property as the governmental body has permitted or may permit to be taxed.*

§ 19.9a of the Revenue Act of 1939, as amended, Ill. Rev. Stat. 1985, ch. 120, ¶ 500.9a, resectioned as 35 ILCS 205/19.9a (1992), recodified as Property Tax Code § 15-80, 35 ILCS 200/15-80 (1994) (emphasis added to amendatory language). (Because the relevant decisions use the older statutory designations, to avoid confusion this provision will continue to be referred to here as "amended ¶ 500.9a.")

37. After the enactment of amended ¶ 500.9a, the Cook County Assessor continued to assess the subject properties for taxation, including assessments for tax years 1985 through 1989. Taxes were extended upon

these assessments by the other Cook County taxing officials as directed by the Illinois Revenue Act of 1939.

38. In correspondence dated September 18, 1985 and November 13, 1985, to the Cook County Collector, and dated January 30, 1986, to the Cook County Assessor, the United States through GSA, stated its position that the subject properties were exempt from taxation. The Cook County Assessor replied to GSA's letter of January 30, 1986, in a letter dated February 6, 1986, and stated the position of the Cook County taxing officials that neither of the subject properties was exempt as of January 1, 1985, pursuant to amended ¶ 500.9a. Copies of this correspondence are attached as Exhibit 9.

39. ON or about April 22, 1988, the United States brought an action in the United States District Court for the Northern District of Illinois seeking: "(1) a declaratory judgment that defendants are prohibited from imposing ad valorem property taxes on certain improvements to real property owned by the United States because such taxation unconstitutionally discriminates against the United States, and (2) preliminary and permanent injunctions prohibiting the defendants . . . from imposing, assessing, or collecting such taxes." *United States v. Hynes*, No. 88 C 3732 (N.D. Ill.) ("*Hynes*"). A copy of the complaint is attached as Exhibit 10.

40. Defendant Cook County officials did not file a counterclaim in Hynes seeking to collect the taxes, interest and penalties assessed and extended against the subject properties through federal court proceedings. The defendant Cook County officials did pursue judgments and orders of tax sale through the Circuit

Court of Cook County regarding the taxes, interest and penalties assessed and extended against the subject properties.

41. For each of tax years 1985 through 1989, the Cook County Collector, as directed by the Illinois Revenue Act of 1939, applied to the Circuit Court of Cook County for entry of a judgment and order of sale in relation to each year's taxes, and thereafter offered the tax liens on the buildings pursuant to the judgment and order of sale at the tax sale held for each year.

42. No bids were submitted at the annual tax sales on the subject properties for any of tax years 1985-1989, and the subject properties (but not the underlying federally owned land) were marked in the tax judgment and warrant records as "forfeited" to the State of Illinois as directed by the Illinois Revenue Act of 1939 for each of these years. The United States did not pay any part of the taxes shown on the tax judgment and warrant records for each of these tax years 1985-1989 until 1995 as set forth below, and it has not paid any amounts attributable to accrued interest or penalties through the date of this stipulation.

43. The parties filed cross motions for summary judgment in *Hynes*. Copies of the parties' Local Rule 12(1) Statements and answers thereto filed in connection with the cross motions are attached as Exhibit 11. On March 26, 1991, this Court granted the United States' motion for summary judgment, holding that the 1985 amendments to ¶ 500.9a discriminated against the United States in violation of the Supremacy Clause of the U.S. Constitution and serving the amendment from the statute. The court held further that the Chicago SSC and the Records Center remained exempt from

taxation under the language of former ¶ 500.9a. *United States v. Hynes*, 759 F. Supp. 1303 (N.D. Ill. 1991). A copy of the decision is attached as Exhibit 12. The defendant Cook County officials filed a motion to reconsider or amend the district court's summary judgment order. The United States also filed a motion to alter or amend the order seeking to ensure that it would constitute a final judgment, and would include the declaratory and injunctive relief prayed for in the complaint.

44. On September 4, 1991, on reconsideration, this Court held that the United States had not sufficiently perfected its right to an exemption of the subject buildings under Illinois law for the years 1986-1989, so that the buildings were taxable for those years and were exempt only for the year 1985. *United States v. Hynes*, 771 F.Supp. 928 (N.D. Ill. 1991). A copy of the decision is attached as Exhibit 13.

45. On September 5, 1991, this Court entered its final judgment pursuant to the opinion of September 4, 1991. *United States v. Hynes*, No. 88 C 3732 (N.D. Ill. Sep. 5, 1991). A copy of the judgment is attached as Exhibit 14.

46. On October 17, 1991, the defendant county officials appealed to the United States Court of Appeals for the Seventh Circuit, seeking to reverse the portion of the judgment enjoining collection of 1985 taxes. On October 28, 1991, the United States cross-appeared seeking to reverse the portion of the judgment which expressly refused to enjoin the officials from assessing and collecting taxes on the buildings for tax years 1986-1989.

Tax Sale of the Subject Properties Pending the Hynes Litigation.

47. In their "Memorandum in Support of Defendants' Motion to Reconsider and Alter the Judgment Order of March 26, 1991, " filed April 4, 1991, in *Hynes* (page 4), the Cook County taxing officials noted that "[a]bsent an injunction [which the district court had not then entered], the defendant Collector is bound by statute to collect the taxes extended against the subject properties." During the week of April 22, 1991, the taxing officials advised the United States by telephone that the subject properties would be included in an upcoming "scavenger" tax sale if an injunction did not prevent it, and offered to check whether this was likely to happen prior to this Court's resolution of both parties' motions to alter or amend the judgment order of March 26, 1991. Such scavenger tax sales were required biennially under section 235a of the Revenue Act of 1939 ("the Scavenger Act").

48. By a letter dated April 30, 1991, the Cook County taxing officials advised the United States that the scavenger sale would not likely be scheduled for sale before July or August, 1991. By letter dated July 19, 1991, the Cook County taxing officials advised the United States that a tax sale schedule had been set and the subject properties would not be sold prior to October, 1991. Copies of the April 30, 1991 and July 19, 1991 letters are attached as Exhibits 15 and 16. Thereafter, the United States wrote a letter to this Court dated July 25, 1991, requesting that the parties' motions to alter or amend judgment be resolved before the scavenger tax sale occurred, stating that "both parties agree that the properties . . . will be offered

for sale at this scavenger sale absent payment of the tax or an injunction from this Court." A copy of this letter is attached as Exhibit 17.

49. In August, 1991, prior to this Court's final judgment on September 5, 1991, the Cook County Collector applied to the Circuit Court of Cook County for judgment and order of sale as to the subject buildings, among a lengthy list of other properties, and the sale was ordered and was scheduled to occur during October and November, 1991. *In Re Application of the County Collector (etc.)*, Misc. No. 91-20 (Cook Co. Cir. Ct., Co. Div.; Judgment and Order of Sale, August 23, 1991, Schneider, J.). A copy of the judgment and order of sale is attached as Exhibit 18. The judgment and order of sale included, *inter alia*, taxes for the 1985 through 1989 tax years on the subject buildings.

50. On October 16, 1991, the United States filed an action styled *United States v. County of Cook, et al.*, No. 91-C 6626 (N.D. Ill.) ("*County of Cook II*), which sought: (1) preliminary and permanent injunctive relief preventing the defendant Cook County taxing officials from conducting any scavenger tax sale and/or any foreclosure sale on the subject buildings; (2) preliminary and permanent injunctive relief preventing the defendant Cook County taxing officials from assessing, imposing, levying, or collecting, by scavenger tax sale, foreclosure sale or otherwise, taxes, penalties, and interest which the defendants claimed to be owed by the GSA on the subject properties for tax years prior to 1986; and (3) preliminary and permanent injunctive relief preventing the defendant Cook County taxing officials from assessing, imposing, levying, or collecting, by scavenger tax sale foreclosure sale, or otherwise,

penalties and interest which defendants claimed to be owed by the GSA on the subject buildings. Contemporaneously, the United States filed an application for a temporary restraining order to prevent the scheduled scavenger tax sales of the subject properties. A copy of the complaint in *County of Cook* is attached as Exhibit 19, and a copy of the memorandum in support of the application for temporary restraining order is attached as Exhibit 20.

51. On October 17, 1991, the Cook County Collector moved in the Circuit Court of Cook County to postpone the sale of the subject properties until December, 1991, in consideration of the ongoing federal proceedings. The Collector also sought modification of the prior judgment and order of sale in conformity with the ruling in *County of Cook I* by the Seventh Circuit, and in *Haynes*. A copy of the Collector's motion is attached as Exhibit 21. The motion was granted and the court ordered the sale delayed until December, 1991. The order also removed taxes of 1985 and prior years from the tax sale, without prejudice to their reinstatement "if it shall be made to appear that such collection is no longer prevented by an order of a court of competent jurisdiction or that any such order previously entered has been vacated, reversed or overruled." *In Re Application of the County Collector (etc.)*, Misc. No. 91-20 (Order of October 17, 1991, Schneider, J.). A copy of this order is attached as Exhibit 22.

52. On November 4, 1991, the Cook County Board of Commissioners resolved that the County would exercise its statutory authority to buy the liens of taxes on the subject properties, in order to secure the collection of any taxes ultimately held lawful by the federal

courts, and to prevent the intrusion into the litigation of any potential private tax purchaser. The resolution also provided for the County to extend the period of redemption from the tax sale to the maximum extent allowed by state law to give sufficient time for the cross appeals to be decided by the Seventh Circuit. Pursuant to the resolution, at the tax sales on December 3 and 4, 1991, the County purchased the subject tax liens and extended the periods of redemption to December 3 and 4, 1994. A copy of the resolution is attached as Exhibit 23.

53. On November 8, 1991, the defendant Cook County taxing officials moved to dismiss the *County of Cook II* action and to deny the motion for temporary restraining order based on res judicata and other grounds. A copy of the motion and the supporting memorandum is attached as Exhibit 24. On November 15, 1991, the Court denied the motion for temporary restraining order based on the County's representation that it would purchase the subject tax liens. A copy of the minute order of November 15, 1991, is attached as Exhibit 25. By the same order the Court set a briefing schedule on defendant's motion to dismiss based on res judicata.

54. On November 25, 1991, the United States, pursuant to Rule 41(a)(1)(i), Fed. R. Civ. P., filed a notice of dismissal in *County of Cook II*. A copy of the notice of dismissal is attached as Exhibit 26. In a minute order

dated November 27, 1991, and entered on the docket on December 2, 1991, the Court stated:

> Pursuant to Notice of dismissal, this cause of action is dismissed under FRCP 41(a)(1)(i).
>
> All pending motions are moot.

A copy of the minute order is attached as Exhibit 27.

55. As directed by the Illinois Revenue Act of 1939, the tax sale of the subject properties to the County was confirmed by the Circuit Court of Cook County on February 7, 1992. *In Re Application of the County Collector (etc.)*, Misc. No. 91-20 (Order of February 7, 1992, Schneider, J.) A copy of the order of confirmation is attached as Exhibit 28. This order was subsequently amended on April 28, 1992, on motion of the County Collector, to conform it to the judgment and order of sale as modified on October 17, 1991. *In Re Application of the County Collector (etc.)*, Misc. No. 91-20 (Order of April 28, 1992, Barth, J.) A copy of the amendment order is attached as Exhibit 29.

The Seventh Circuit's Hynes Decision and Subsequent Proceedings

56. On April 5, 1994, the Court of Appeals for the Seventh Circuit rendered its decision *en banc* in the *Haynes* cross appeals, reversing this Court's judgment enjoining the assessment and collection of taxes on the subject properties for tax year 1985, and affirming its judgment (on alternative grounds) permitting the assessment and collection of taxes for the subsequent years. *U.S. v. Hynes*, 20 F.3d 1437, 1443 (7th Cir. 1994). A copy of this opinion is attached as Exhibit 30.

57. The United States did not seek review by the Supreme Court of the *en banc* decision of the court of Appeals in *Hynes*. Final judgment was entered pursuant to the Seventh Circuit mandate on April 28, 1994. A copy of the judgment and the District Court docket entry showing the judgment is attached as Exhibit 31.

58. On April 20, 1994, the County and the Collector moved in the Circuit Court of Cook County to include taxes for 1985 within the 1991 scavenger tax sale of the subject properties. A copy of the motion is attached as Exhibit 31. On April 25, 1994, the court granted this motion and reinstated the sale as to the 1985 taxes, finding *inter alia* that: by its order of October 17, 1994, the court had removed the 1985 taxes from the sale pursuant to this Court's injunction, without prejudice to their reinstatement if the injunction should be vacated or reversed; the Seventh Circuit decision in *Hynes* had reversed the district court injunction as to 1985 taxes; and the Illinois Revenue Act provided that on vacatur of an injunction, collection of any tax was to proceed "as though the same...had never been enjoined." *In Re Application of the County Collector (etc.)*, Misc. No. 91-20 (Order of April 25, 1994, Barth, J.). A copy of this order is attached as Exhibit 33.

59. Thereafter, at the request of the County pursuant to the Property Tax Code, taxes for the years 1990 through 1992 on the Records Center and taxes for the years 1990 through 1993 (first installment) on the Chicago SSC were included in the amount required to redeem the two buildings from the tax sale by the Cook County Clerk. Copies of estimates of redemption prepared by the Cook County Clerk showing the full amount of taxes, interest and penalties due upon the

subject properties for the tax years 1985-1992 on the Records Center and 1985-1993 (first installment) on the Chicago SSC and required to redeem the subject properties from the tax sale pursuant to Illinois law are attached as Exhibit 34. This exhibit also includes a line-by-line explanation of the estimates. As of the end of the periods of redemption from the tax sale on December 3-4, 1994, a total sum of $65,363,289.99, of which amount $33,160,834.08 was for interest and penalties, would have been required to redeem both properties.

60. On August 19, 1994, GSA paid the current taxes for the entire year 1993 on the Records Center, together with the second installment of taxes for 1993 on the Chicago SSC (approximately one-half that year's taxes). These bills were issued by the Collector GSA after the Seventh Circuit's *Hynes* decision. GSA paid the entire year 1993 taxes on the Records Center because Cook County had not issued a first installment 1993 tax bill on that building due to a change in its parcel index number. GSA made, and the Cook County taxing officials accepted these payments, because under Illinois law these taxes were paid on time and no additional liabilities in the form of interest or penalties had accrued. Therefore, there are no claims at issue in this litigation for any amount of taxes on the Records Center for 1993 and following tax years, and there are no claims at issue for any amount of taxes on the Chicago SSC for the second installment of 1993 and following tax years.

61. Cook County has served various notices upon owners, occupants and parties in interest as required under the Illinois Property Tax Code pursuant to the

tax sales of the subject properties. On August 8, 1994, as required by the Illinois Property Tax Code, the County filed supplemental petitions within the tax sale proceeding pending in the Circuit Court of Cook County, seeking tax deeds to the subject properties in the event that they were not redeemed by payment of the delinquent taxes. *In Re Application of the County Collector (etc.)*, Misc. No. 91- 20, Tax Deed Nos. 94 COTDS 1729 and 94 COTDS 1730. Amended petitions containing technical corrections were filed on August 11, 1994. Copies of the amended petitions are attached as Exhibit 35.

62. On November 29, 1994, on the County's motion, the Circuit Court of Cook County stayed all proceedings on the tax deed petitions pending the disposition of the instant complaint filed by the United States in this Court. *In Re Application of the County Collector (etc.)*, Misc. No. 91-20, Tax Deed Nos. 94 COTDS 1729 and 94 COTDS 1730 (Orders of November 29, 1994, Barth, J.). Copies of these orders are attached as Exhibits 36 and 37.

63. By an agreed order signed by the parties and entered on February 16, 1995, the parties arranged for the United States to pay over to the Cook County Collector, by deposit in an escrow account established by the Collector and State's Attorney, all the principal taxes for tax years 1985 through 1992, inclusive, as to the Records Center, and for tax years 1985 through the first installment of 1993, inclusive, as to the Chicago SSC. The parties agreed that these taxes amounted to the total sum of $32,202,455.91. A copy of the agreed order is attached as Exhibit 38.

64. On March 1, 1995, the United States paid to the County Collector the 1985-1993 principal taxes in the amount of $32,202,455.91 by wire transfer to the account established by the Collector and State's Attorney. As shown in ¶ 59 above, the payment would leave a balance consisting of interest and penalties for these 1985-1993 tax years in the total amount of $33,160,834.08 calculated pursuant to Illinois law as of the end of the periods of redemption.

65. The average of the annual average prime interest rates for the period of 1985 through 1993 was 8.60% pursuant to The Statistical Abstract of the United States (1994). The average of the annual average prime interest rates for the period of 1977 through 1993 was 10.46% pursuant to The Statistical Abstract of the United States (1987 and 1994). Copies of the relevant pages of the Statistical Abstracts are attached as Exhibit 39.

66. Prior to, during, and after the litigation in *Haynes and County of Cook II*, the Cook County Assessor continued to assess the subject properties for taxation for tax years 1990 through 1993, in addition to the assessments previously made for 1985-1989 (and prior years). Taxes were extended upon these assessments by the other Cook County taxing officials as directed by the Illinois Revenue Act of 1939. For each of tax years 1985-1993, the Cook County Collector, as directed by the Revenue Act, applied to the Circuit Court of Cook County for entry of a judgment and order of sale and offered the tax liens for those years pursuant to the judgment and order of sale at a tax sale, separate and apart from the 1991 scavenger tax sale of the subject buildings to the County of Cook. No bids

were submitted at the annual tax sales on the subject properties for any of tax years 1985-1993, and the properties were marked in the tax judgment and warrant records as "forfeited" to the State of Illinois as directed by the Revenue Act of 1939 for each of these years.

67. Although it was aware of the state court tax judgment and sale proceedings, the United States has never, through the present time, appeared in any of them. The United States has not submitted to be a party, nor has it consented to or acknowledged the state court's jurisdiction in these proceedings. By so stipulating, defendants-counterplaintiffs do not waive their argument that, through 40 U.S.C. § 602a(d), the United States has consented to the enforcement of the subject taxes, interest, and penalties in the Illinois courts, by the aforementioned judicial tax sale proceedings or by other proceedings, as a matter of law.

Dated: February *13*, 1996

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K:\WILLCALL\JTS\REVSTIP.03 February 13, 1996

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NO. 98-1107

NO. 94 C 7068
DAVID H. COAR, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

COUNTY OF COOK, ILLINOIS, ET AL., DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Filed April 30, 1999]

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. ILLANA DIAMOND ROVNER, Circuit Judge

Order

The United States filed a petition for rehearing and petition for rehearing en banc on March 16, 1999. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have noted to deny rehearing. The petition for rehearing is therefore DENIED.